Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN D. FREEMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent(s).

On Petition for Writ of Certiorari
To The Supreme Court of the
State of Florida

PETITION FOR WRIT OF CERTIORARI

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"CAPITAL CASE"

QUESTIONS PRESENTED:

1. The Florida Supreme Court continues to hold that aggravating circumstances necessary for imposition of the death penalty can be found by a trial judge, and not a jury beyond a reasonable doubt. Does the Florida Supreme Court incorrectly interpret and apply the United States Supreme Court's holding in Ring v. Arizona, thus violating Sixth, Eighth, and Fourteenth Amendment Rights of the United States Constitution, when it continues to hold that aggravating circumstances necessary for imposition of the death penalty can be found by a trial judge, and not a jury beyond a reasonable doubt?

2. Is the judicial "weighing" of aggravating and mitigating circumstances under Fla. Stat. 921.141 (3) (2003), a "factual determination" that increases the maximum punishment of a defendant, and should this "weighing" of aggravating and mitigating circumstances be conducted and found by a jury beyond a reasonable doubt under Ring v. Arizona and Apprendi v. New Jersey?

PARTIES TO THE PROCEEDINGS BELOW:

Petitioner is John D. Freeman. He is the Defendant sentenced to death in the trial court, and the Appellant in his 3.850 Motion for Postconviction Relief to the Supreme Court of Florida. He brings this action not only on his own behalf, but on behalf of all capital postconviction defendants in the State of Florida.

Respondent is the State of Florida. The State of Florida compromised the Plaintiff in the trial court, as well as Defendant's subsequent appeal regarding the denial of his 3.850 Motion for Postconviction Relief.

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PETITION FOR WRIT OF CERTIORARI:

John Freeman respectfully petitions for a writ of certiorari to vacate and remand the judgment of the Florida Supreme Court for reconsideration, in light of the United States Supreme Court's decisions in *Ring v. Arizona*, *Sattazahn v. Pennsylvania*, and *Apprendi v. New Jersey*.

OPINIONS BELOW:

This case began following the trial court's second order of denial of Petitioner's first 3.850 Motion for Postconviction Relief, dated July 24, 2001, upon remand by the Florida Supreme Court in *Freeman v. State*, 761 So. 2d 1055 (Fla. 2000). The opinion of the Supreme Court of Florida affirming said trial court's denial is reported at 858 So. 2d 319 (Fla. 2003), and was entered on July 11, 2003.

JURISDICTION:

The judgment to be reviewed was entered by the Florida Supreme Court on July 11, 2003, reported at *Freeman v. State*, 858 So. 2d 319 (Fla. 2003). The Motion for rehearing was denied by the Florida Supreme Court on November 25, 2003, reported at *Freeman v. State*, 2003 Fla. LEXIS 2078 (Fla. 2003). The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

1. Florida Statute 921.141 (3) (a) (b) (2003), states:

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH:

Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5),

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with Florida Statute s. 775.082.

2. The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

3. The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

4. The Eighth Amendment to the United States Constitution provides in relevant part: "cruel and unusual punishments shall not be inflicted."

STATEMENT OF THE CASE:

This Petition concerns the continuing viability of Florida's capital sentencing statute in light of the United States Supreme Court's holding of *Ring v. Arizona*, *Sattazahn v. Pennsylvania*, and *Apprendi v. New Jersey*. This petition centralizes on two issues: (1) Whether it is constitutionally sound under the Sixth, Eighth, and Fourteenth Amendments to impose a sentence of death utilizing aggravating circumstances not found by a jury beyond a reasonable doubt and; (2) Whether it is constitutionally sound under the Sixth, Eighth, and

Fourteenth Amendments for a trial judge, and not a jury beyond a reasonable doubt, to "weigh" the aggravating and mitigating factors to determine whether a sentence of death is deserved.

There is a marked division regarding the aforementioned issues. Various state and federal courts throughout the United States are in complete disarray concerning the true holding and scope of *Ring v. Arizona*. The contrasting interpretations and applications of the United States Supreme Court's holding in *Ring* undoubtedly create confusion among the general population of American citizens, ultimately undermining public confidence in the death penalty. There is also a distinct possibility that these interpretations result in constitutional rights being violated and jeopardized. In sum, the lower courts seek and require guidance. The United States Supreme Court must define the exact effect *Ring* has on capital sentencing statutes. If the United States Supreme Court does not rule on this issue, lower courts will continue to incorrectly and arbitrarily interpret and apply one of the most recent holdings issued on America's death penalty system.

I. FACTUAL BACKGROUND

Petitioner was convicted of first degree murder for the 1986 murder of Leonard Collier. The jury recommended death by a vote of 9-3. Petitioner was subsequently sentenced to death based on the judicial finding of three aggravating circumstances: (1) Petitioner was previously convicted of first degree murder, armed robbery, and burglary of a dwelling with an assault; (2) Petitioner committed the Collier murder for pecuniary gain and; (3) Petitioner committed the Collier murder during the commission of a burglary of a dwelling. There were no statutory mitigators found by the judge. Four nonstatutory mitigators were found: (1) Petitioner was of low

intelligence; (2) He had been abused by his stepfather; (3) He possessed some artistic ability; and (4) Petitioner enjoyed playing with children.

II. PROCEEDINGS BELOW

Petitioner's conviction and sentence were affirmed on appeal. *Freeman v. State*, 563 So. 2d (Fla. 1990). Petitioner then filed his first motion for postconviction relief, which the trial court summarily denied. *Freeman v. State*, 761 So. 2d 1055 (Fla. 2000). Petitioner appealed the summary denial of his postconviction motion. The Supreme Court of Florida granted Petitioner's appeal and remanded the case back to the trial court. Id. The trial court then conducted an evidentiary hearing on the remanded claim and held there was no error. Petitioner appealed the trial court's second denial of his postconviction motion to the Florida Supreme Court, whereby the Florida Supreme Court affirmed the trial court's denial of relief. *Freeman v. State*, 858 So. 2d 319 (Fla. 2003). Petitioner filed a Motion for Rehearing based on the Florida Supreme Court's affirmation of the trial court's denial. The following pertinent issues were raised in the Motion for Rehearing: (1) Whether *Ring v. Arizona* allows a Florida trial judge to find and utilize aggravating circumstances necessary for imposition of the death penalty; (2) Whether a prior felony conviction aggravating circumstance constitutionally allows a judge to find the existence of other aggravating circumstances necessary for imposition of the death penalty; and (3) Whether the judicial "weighing process" of aggravating and mitigating circumstances is a factual determination subject to the holding in *Ring*, and thereby should be found by a jury beyond a reasonable doubt. The Florida Supreme Court denied Petitioner's Motion for Rehearing on November 25, 2003. No opinion or attention was given to Petitioner's alleged *Ring* claims. Petitioner

subsequently files this Writ of Certiorari to the United States Supreme Court, asking this court to remand the Florida Supreme Court's denial of Petitioner's case in light of the holding in *Ring v. Arizona*.

REASONS FOR GRANTING THE PETITION:

MAY IT PLEASE THE COURT:

Petitioner initially states the issues presented in this Writ of Certiorari implicate the integrity and the viability of America's death penalty system. Petitioner claims that both the lower state and federal courts throughout the United States cannot agree how to constitutionally proceed through a capital offense case. The lower courts cannot be allowed to continue the arbitrary application of death sentences throughout this country. Guidance is needed and required to ascertain definitive rules for the following issues Petitioner presents. Finally, a definitive decision is needed to resolve the apparent ambiguity and inconsistent applications of *Ring v. Arizona*.

1. **PETITIONER WAS SENTENCED TO DEATH IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS. THE TRIAL JUDGE, AND NOT THE JURY, FOUND AND UTILIZED AGGRAVATING CIRCUMSTANCES OTHER THAN PETITIONER'S PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE TO IMPOSE PETITIONER'S DEATH SENTENCE.**

   A. Florida's maximum penalty for first degree murder under Fla. Stat. 921.141 is life imprisonment. Therefore, any aggravating

circumstance necessary for imposition of the death penalty operates as a functional equivalent of an element of a greater offense.

Florida's capital sentencing statute allows a judge to impose the death penalty based on aggravating factors not found by a jury beyond a reasonable doubt. This is a violation of Petitioner's Due Process rights, the rules of law declared in *Ring v. Arizona*, *Sattazahn v. Pennsylvania*, *Apprendi v. New Jersey*, and the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Petitioner alleges that under *Ring*, a trial judge cannot find the existence of *all* aggravating circumstances necessary to impose a sentence of death.

Petitioner's contention first rests on the holding in *Ring v. Arizona*, whereby the United States Supreme Court extended from and restructured its holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). [The *Apprendi* Court held "if a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it - must be found by a jury."] Id. *Ring* held that: (1) *Apprendi's* holding applied to death penalty cases and thereby *Walton v. Arizona* was overruled; (2) Arizona's maximum penalty for first degree murder is life imprisonment, and therefore Arizona's aggravating circumstances operate as "the functional equivalent of an element of the offense." 536 U.S. 584 (2002).

To explain its holding in *Ring*, the Court first held the Arizona capital sentencing statute in question authorized only a maximum punishment of life imprisonment, because said Arizona statute explicitly cross-referenced the statutory provision requiring the finding of an aggravating circumstance before the imposition of the death penalty. *Ring* held that the required finding of an aggravating circumstance

exposed *Ring* to a greater punishment than that authorized by the jury's guilty verdict." Id. ["A defendant may not be exposed... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."] *Ring* further stated that if Arizona was to prevail on its argument that the maximum punishment was death, *Apprendi* "would be reduced to a meaningless and formalistic rule of statutory drafting." Id.

The *Ring* Court then held since life is the maximum punishment under Arizona law, (unless an aggravating circumstance was proven) Arizona's aggravating factors operate as the "functional equivalent of an element of a greater offense." Id. ["The dispositive question, we said, is one not of form, but of effect. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."] *Ring* concluded by stating that, "a sentencing judge, sitting without a jury, cannot find an aggravating circumstance necessary for imposition of the death penalty," and "the right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." 536 U.S. 584 (2002).

A short time later this Court's ruling in *Sattazahn* reaffirmed *Ring's* holding. ["Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond reasonable doubt."] 537 U.S. 101 (2002). The *Sattazahn* Court premised said reasoning on the fact that capital sentencing statutes which prescribe a finding of an

aggravating circumstance before a death sentence may be imposed make: "murder a distinct, lesser included offense of murder plus one or more aggravating circumstances, whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death." Id.

Both Florida and Arizona capital sentencing statutes requires at least one aggravating factor be found to impose a sentence of death. Therefore, *Ring* and *Sattazahn's* holdings clearly implicate Florida law in the regard that: In form, Florida's maximum penalty for first degree murder is death, but in effect, the maximum penalty is life imprisonment unless the jury finds the existence of any aggravating circumstances. Petitioner alleges Florida's aggravating circumstances operate as "facts that increase the maximum punishment that may be imposed, and those facts, no matter how the state labels them, constitutes an element and must be found by a jury beyond a reasonable doubt." *Apprendi*, 530 U.S. 466 (2000).

Petitioner points to Florida's capital sentencing scheme. To determine whether a Defendant will be sentenced to death in Florida, the jury is only required to find "the existence of one aggravating factor." Fla. Stat. 921.141(1) (2001). By finding the existence of one aggravating factor, the jury does not have to make any written findings of what aggravating factor was found. Id. Moreover, said Florida Statute holds that once the existence of the aggravating factor is found by the jury, the Defendant is then rendered "death eligible". Id. Once a defendant is found death eligible, a judge shall then find other aggravating circumstances not found by a jury beyond a reasonable doubt. The judge will then weigh said aggravators against any judicially found mitigators. If

aggravation outweighs mitigation, a sentence of death will be imposed. Fla. Stat. 921.141 (3) (a) (b) (2001).

If a Florida judge does not make findings of all aggravating and mitigating circumstances necessary for the imposition of death, Florida law requires the Defendant be punished by life imprisonment. Fla. Stat. 775.082 (2001). Therefore, Florida law holds if the requisite written findings of sufficient aggravation outweighing mitigation are not found by a judge; a jury verdict of guilt by first degree murder (and sentence of life imprisonment) will be the maximum sentence imposed. Id.

Despite the recent holdings of *Ring* and *Sattazahn*, Florida's capital sentencing scheme has been upheld. The Florida Supreme Court holds that (1) Florida's maximum punishment is death, and (2) aggravating circumstances are "sentencing factors," *not* the functional equivalent of the offense. See *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001) [*Mills* based on the fact "no Court has extended *Apprendi* to capital schemes," and "because *Apprendi* did not overrule *Walton v. Arizona*, the basic scheme in Florida is not overruled either."]; See also *Hildwin v. Florida*, 490 U.S. 638 (1989).

Although the Florida Supreme Court has refused to alter the capital sentencing statute by applying *Ring*, there is much disagreement amongst the Florida Supreme Court Justices if this decision is constitutionally sound. For example, Justice Pariente stated in a concurring opinion to *Bottoson v. Moore* that, "I believe the Supreme Court's decision in *Ring* requires this Court recede from its previous holding in *Mills v. Moore*, that death is the maximum penalty for first-degree murder in Florida." 833 So. 2d 693 (Fla. 2002). Justice Pariente further stated in *King v. State* that, "I believe we should acknowledge the U.S. Supreme Court's evolution in Sixth Amendment

jurisprudence from the time of *Spaziano* and *Hildwin* and recognize that those decisions, which came well before *Apprendi* and *Ring*, are of uncertain precedent as to the specific Sixth Amendment holding in *Ring* that aggravating factors in a death penalty statute must be found by a jury." 831 So. 2d 143 (Fla. 2002). Justice Quince held in *Bottoson* that, "the Court (Supreme Court of the United States) seems to have turned the concept of statutory maximum on its head." Id. Continuing with *Bottoson*, Chief Justice Anstead held, "After *Ring*, that harbor (Florida's death penalty scheme) may not be so safe, and *Ring* is clearly the most significant death penalty decision of the U.S. Supreme Court since the decision in *Furman v. Georgia*." Id. In fact, the Florida Supreme Court is evenly divided concerning *Ring's* impact on Florida's capital sentencing scheme. See Id.

The Florida Court's decision to downplay the effect of *Ring* on the capital sentencing statute is far from universal throughout the lower courts of the United States. To the contrary, some courts have interpreted and applied *Ring* in manners adverse to Florida. Some of these courts have even addressed Florida's apparent lack of urgency regarding the *Ring* issue. See *Tennessee v. Cole*, 2003 Tenn. Crim. App. LEXIS 1002; ["Initially, we reject the state's contention that *Apprendi* and *Ring* are not applicable to the present case because imposition of the death penalty does not enhance the defendant's sentence for his first degree murder conviction beyond its statutory maximum. The United States Supreme Court expressly rejected this argument in *Ring*, concluding that the required finding of an aggravating circumstance exposed the defendant to a greater punishment than that authorized by the jury's verdict of conviction."] *Ring v. State*, 65 P. 3d 915 (Ariz. 2003); [Holding the U.S. Supreme Court "requires a jury to consider all aggravating factors urged by the State and not either (1) exempt from *Ring v. Arizona*, (2) implicit

in the jury's verdict, or (3) otherwise established beyond a reasonable doubt."] *Caulk v. Delaware*, 815 A. 2d 314 (Del. 2002), ["It is sufficient to note that each justice (In Florida) analyzed many of the intricate issues raised in *Ring* and reached different conclusions as to the future effect of the *Ring* decision."]; *Johnson v. Nevada*, 59 P. 3d 450 (Nev. 2002), ["A panel of judges, without a jury, cannot find aggravating circumstances necessary for imposition of the death penalty."]; *Summerlin v. Stewart*, 2003 U.S. App. LEXIS 18111, ["*Ring* established the bedrock principle that, under the Sixth Amendment, a jury verdict is required on the finding of aggravated circumstances necessary to the imposition of the death penalty. *Ring* requires the vacation of a capital judgment based on judge-made findings."]

The aforementioned case law shows there is controversy concerning *Ring's* application throughout the United States. Further, this controversy is of great national importance. In particular, the different (and inconsistent) interpretations and applications of *Ring* force American citizens to believe the death penalty system is still being applied arbitrarily. Also, the various interpretations of *Ring* leave the American people in disarray as to the importance of U.S. Supreme Court decisions. Without uniform application of the law, people will question the merits of a Supreme Court decision. Individual state discretion cannot be allowed to persist for Ring's application. If this continues to happen, public confidence in America's death penalty system will surely be undermined.

Continuing, one issue that seems to be clear is that Florida's capital sentencing statute is similar to the pertinent statute in Arizona, the same statute the United States Supreme Court found to establish a maximum sentence of life in *Ring v. Arizona*. For example, the *Ring* Court reasoned that since Arizona's

statute explicitly cross-referenced a statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty, Arizona's first degree murder statue authorized a maximum penalty of death only in a formal sense. *Ring v. State*, 536 U.S. 584 (2002).

Florida's capital sentencing statute is no different than Arizona's in this regard, for Florida's statute also holds that at least one aggravating circumstance must be found before a judge can impose the penalty of death. Fla. Stat. 921.141 (2002). The Florida and Arizona capital sentencing statutes are "otherwise identical regarding the prerequisites to the imposition of the maximum penalty." *Bottoson*, 833 So. 2d 693 (Fla. 2002) (Pariente concurring in result only). Despite this similarity, the Florida Supreme Court refuses to apply the clear meaning of *Ring v. Arizona*. Nor will the Florida Supreme Court make an alternative interpretation of *Ring* in relation to the Florida capital sentencing scheme unless: "the U.S. Supreme Court and not this Court definitively removes the uncertainty of Florida's death penalty statute." See *King v. State*, 831 So. 2d 143 (Fla. 2002).

Petitioner contends by upholding Florida's capital sentencing statute in defiance of *Ring v. Arizona*, the Florida Court is "perpetrating legal error under the guise of stare decisis." See *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987). ["Stare decisis does not command blind allegiance to precedent. Perpetrating an error in legal thinking under the guise of stare decisis serves no-one well and only undermines the integrity and credibility of the Court."] By yielding to the precedent, the Florida Court ignores the fact that *Ring* affects its capital sentencing statute and prior holdings regarding the maximum sentence a person accused of first-degree murder can face. By requiring the finding of an

aggravating circumstance before death can be imposed (and holding that life imprisonment is not the maximum penalty); Florida is in direct conflict with *Ring* and *Sattazahn's* holding that, "murder is a distinct, lesser included offense of murder plus one or more aggravating circumstances." 537 U.S. 101 (2002). Despite the apparent contradiction, Florida continues to uphold its precedent. "Although the doctrine of stare decisis is of fundamental importance to the rule of the doctrine of law... (the Court's) precedents are not sacrosanct." See *Ring*, 122 S. Ct. 2428 (2002). Therefore, not only is the Florida Supreme Court ignoring the holdings of *Ring* and *Apprendi*, but it is ignoring the "not of form, but of effect," of its own capital sentencing statute.

The Florida Court's nonfeasance to apply *Ring* creates a great constitutional violation. A Florida trial judge is allowing the jury to convict a defendant of one offense [first-degree murder] but the judge is then subsequently sentencing a defendant as if convicted for an entirely separate offense [capital murder] of which the jury did not convict defendant of. See *Cole v. Arkansas*, 333 U.S. 196 (1948) ["It is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him on a charge that was never made...To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."]; *Sullivan v. Louisiana*, 508 U.S. 275 (1993) ["To hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the finding to support that verdict might be - would violate the jury trial guaranteed."] ["Due Process protects a defendant from criminal conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged."] *In re Winship*, 397 U.S. 358 (1970). Therefore, Petitioner

requests this Court to grant this Petition and hold that life imprisonment is the maximum penalty a Florida defendant faces for first degree murder.

B. In the existence of a prior violent felony aggravating circumstance, the United States Supreme Court's holding in *Almendarez-Torres* does not allow a Florida trial judge to find the existence of other aggravating circumstances necessary for imposition of the death penalty. Further, *Torres* does not allow the trial judge to find the underlying facts of a prior violent felony aggravating circumstance. The existence of aggravating circumstances other than a prior violent felony or a "murder committed during the course of a felony," and the underlying facts of any prior violent felony aggravator must be found by a jury beyond a reasonable doubt.

In *Almendarez-Torres*, the United States Supreme Court held a prior conviction of recidivism may be found by a judge, and not a jury, to increase a defendant's maximum sentence beyond the range otherwise permissible. 523 U.S. 224 (1997). The United States Supreme Court subsequently stated in *Torres* that, "recidivism is a traditional, if not the most traditional, basis for a sentencing court's increasing of an offender's sentence." Id. The United States Supreme Court concluded the provision did not define a separated offense, but rather was a penalty provision which authorized the trial court to increase the sentence for a recidivist. Id. Accordingly, the court held the government was not constitutionally required to allege the petitioner's prior convictions in the indictment. Id.

Subsequently, *Apprendi v. New Jersey* (decided subsequently to *Torres*) held *Torres* was a "narrow exception, one that turned heavily upon the fact that...procedural safeguards attach to any "fact" of prior conviction." 530 U.S. 488 (2000). After *Apprendi*, the United States Supreme Court held in *Ring v. Arizona* that the *Torres* decision was not being challenged. 536 U.S. 584 (2002).

The Florida Supreme Court has interpreted *Torres* and *Ring* to mean that a trial judge can find the existence of aggravating circumstances necessary for imposition of the death penalty, (not found by the jury beyond a reasonable doubt) if a Defendant had a prior violent felony or a "murder committed during the course of a felony" aggravating circumstance. See *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003). [Holding "a prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by a unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions."]; *Robinson v. State*, WL 2004 170362 (Fla. 2004). The Florida Supreme Court also does not require a jury find beyond a reasonable doubt the underlying factors that a prior violent felony exists. See *Duest v. State*, 2003 Fla. LEXIS 1069.

However, the interpretation by the Florida Supreme Court regarding said issue is not unanimous among the Florida justices. For example, Justice Pariente stated in a recent concurring opinion, "I recognize that courts in other states have reached differing conclusions as to whether *Ring* requires more than a jury finding of a single death-qualifying aggravating circumstance.... However, unless and until the United States Supreme Court expands its holding in *Ring*, the death eligibility determination by a jury is the sole Sixth Amendment requirement I glean from *Ring*." Id. In contrast and in the same case,

Chief Justice Anstead stated, "*Ring* requires more from a jury than just finding the existence of a prior violent felony aggravator." For instance, Anstead held, "In effect, the Court's decision [in *Duest*] adopts a per se harmlessness rule as to *Apprendi* and *Ring* claims in cases that involve the existence of the prior violent felony aggravating circumstance, even though the trial court expressly found and relied upon other significant aggravating circumstances not found by a jury in imposing the death penalty." Id. Anstead further stated, "I believe this decision violates the core principle of *Ring* that aggravating circumstances actually relied upon to impose a death sentence may not be determined by a judge alone...This violates the letter and spirit of *Ring*... and would make a mockery of the principle *Ring* stands for." Id.

Court authorities across the United States are split on the issue of whether *Ring* allows the trial judge to find and utilize aggravating circumstances to impose a death sentence if a prior violent felony or a "murder committed during the course of a felony" aggravator exists. For example, in *Johnson v. Nevada*, the Nevada Supreme Court determined *Ring* held "a capital sentencing scheme that places the determination of aggravating circumstances in the hands of a judge violates the Sixth Amendment right to a jury trial." 59 P. 3d 450 (Nev. 2002).

Moreover, after *Ring v. Arizona* was decided by the United States Supreme Court, the Arizona Supreme Court held in *Ring v. State*,

> "As the State contends, once the government establishes any aggravating factor, a defendant becomes "death eligible" in the strict sense, and establishing additional aggravating factors does not render a defendant "more" death eligible. In our view however, "*Ring* II" should not be read so narrow. Although the Court there

> considered a death sentence based upon the existence of a single aggravating factor, we conclude that "*Ring* II" requires a jury to consider all aggravating factors urged by the state and not either exempt from *Ring* II, implicit in the jury's verdict, or otherwise established beyond a reasonable doubt." 65 P. 3d 915 (Ariz. 2003).

Petitioner contends the Florida Supreme Court's interpretation of *Torres* is incorrect. Said interpretation is incorrect because it allows a trial judge to unconstitutionally find the existence of aggravating circumstances beyond a prior violent felony or murder committed during the course of a felony. When the United States Supreme Court decided *Torres*, it did not intend for a trial judge in a capital case to find aggravating circumstances other than a prior conviction to use for imposition of the death penalty. The *Torres* decision was based on a non-capital case. Its holding does not claim a trial judge is allowed to find the existence of aggravating circumstances necessary to impose the death penalty, even if a prior violent felony exists. Rather, *Torres* holds only that "even though the statutory maximum of a statute could be increased by proof of the existence of a prior predicate conviction, such a conviction would not constitute an element of the crime triggering a right to proof beyond a reasonable doubt before a jury." *Apprendi*, 530 U.S. 466 (2000).

Petitioner further points to *Ring*, which applied the *Apprendi* case to capital defendants. The subsequent Court in *Ring* did not specifically state (or hold) whether the existence of a prior violent felony aggravator would allow a trial judge to constitutionally find and utilize any other aggravating circumstances to impose a death sentence. In fact, and in Petitioner's view; the *Ring* Court's reasoning was similar to Petitioner's current argument when it held,

"aggravating factors (emphasis on plural) operate as the functional equivalent of an element of a greater offense, and the Sixth Amendment requires that they be found by a jury." 536 U.S. 584 (2002). Petitioner contends the *Ring* Court, based on said language, held a jury must find the existence of all aggravating factors. This being true even when a particular defendant has an established prior violent felony aggravating circumstance. See 536 U.S. 584 (2002). Further, Petitioner believes *Sattazahn's* meaning behind "the jury finding existence of any aggravating circumstances" should be taken at face value, to wit: All aggravating circumstances, regardless of whether a defendant has a prior violent felony conviction or murder committed during the course of a felony for aggravation, must be found by a jury beyond a reasonable doubt. Petitioner states the United States Supreme Court should construe *Torres* as good law, because *Torres* was a "narrow exception" and therefore not meant to consider aggravating circumstances in a capital case.

In conclusion, the aforementioned United States Supreme Court holdings mean: If an aggravating circumstance is necessary, subsequently found, and utilized by a judge in imposing the death penalty; a constitutional violation has occurred. This continues to be true regardless of whether a defendant has a prior violent felony aggravator. See *Ring*, 536 U.S. 584 (2002); *Sattazahn*, 537 U.S. 101 (2002).

Furthermore, Petitioner asserts that if proof of underlying facts are necessary for an aggravating circumstances to exist, it follows the decision in *Almendarez-Torres* does not allow a trial judge to find any underlying facts necessary to prove said aggravating circumstances. Petitioner cites a federal court decision in *Breitweiser*, which held:

> "The Supreme Court in *Torres* was presumably thinking only of recidivist statutes that require a categorical approach with regard to the type of predicate offense that could trigger an enhancement. With such statutes, there would never be a question of fact as to whether the conviction had been proven, because any conclusion on that matter would constitute a question of law to be determined by the sentencing court. If a recidivist statute permitted enhancement based on proof of underlying conduct, however, factual questions could arise as to exactly what conduct the defendant engaged in. Typically such factual questions are within the province of a jury and this Court doubts that the Supreme Court would construe *Torres* as applying to such situations." *United States v. Breitweiser*, 220 F. Supp. 2d 1374 (N.D. Ga. 2002).

In apparent agreement *Breitweiser*, when faced with the issue of whether the Sixth and the Fourteenth Amendments require the jury, and not the trial judge to make findings that go beyond the mere fact that a prior conviction exists in order to apply the prior violent felony aggravator, the Tennessee Court of Criminal Appeals held:

> "If underlying facts are not found by the jury to find the existence of a prior violent felony aggravator, said aggravator could not be applied and the Defendant would be ineligible for the death penalty. As applicable to the case at bar, it was necessary to determine not only that the prior convictions existed, but also that they involved violence." *Tennessee v. Cole*, 2003 U.S. App. LEXIS 18111

The Tennessee Court's analysis of the issue acknowledged a disparity of views, citing Florida's view

as directly contrary to their own. Id. ["Some states have interpreted the United States Supreme Court's holding in *Ring* to allow a trial judge to determine factual issues relating to aggravating circumstances which involve prior convictions."] See *Belcher v. State*, 851 So. 2d 678 (Fla. 2003) ["Stating that the *Ring* holding allows a trial judge to determine factual issues relating to aggravating circumstances which involve prior convictions."] The Tennessee Court also noted this issue has not been "definitively" decided by the United States Supreme Court. Id. Lastly, the Court stated that when a trial judge examines the underlying facts (in a prior violent felony conviction), factually determines that a prior offense involved violence, and then based upon its finding of fact, instructs the jury as a matter of law that the prior felony involved violence, it is arguable that this usurps the role of the jury as trier of a fact. Id.

Said Tennessee Court represents the tip of the iceberg regarding the disagreement and disarray among both state and federal courts concerning *Torres'* application. See *Ring v. State*, 65 P. 3d 939 (Ariz. 2003). [Holding that "finding a prior violent felony conviction as an aggravating circumstance requires the judge to go beyond the mere fact that the prior conviction existed."]

Petitioner contends that since Florida's capital sentencing statute requires additional findings beyond the fact that a prior violent felony aggravator exists, these findings under *Ring* and *Apprendi* must be found by a jury beyond a reasonable doubt. In support, Petitioner first cites to Florida's capital sentencing scheme, which requires additional findings beyond the bare fact that a prior conviction exists before it can be used as an aggravating circumstance. Fla. Stat. 921.141(5). For example, the Florida Statute permits the finding of an aggravating circumstance where, "the defendant was previously convicted of

another capital felony or of a felony involving the use or threat of violence to the person." Id. Hence, other than a conviction of a capital felony, the trial judge must find that a felony conviction involved the use or threat of violence before this aggravating circumstance is proven." Id. Moreover, Florida case law suggests this aggravating circumstance often rests on factual determinations well beyond the mere existence of a prior conviction. See *Hess v. State*, 794 So. 2d 1249 (Fla., 2001); *Sweet v. State*, 624 So. 2d 1138 (Fla. 1993); *Gore v. State*, 706 So. 2d 1328 (Fla. 1998).

Petitioner contends that since said Florida Statute requires underlying facts to be proven before a prior felony conviction aggravating circumstance can be used to impose the death penalty, the Florida Courts should have underlying facts be found by a jury in accordance with *Ring*. Also, in light of the pronounced "narrow holding" of *Torres*, Petitioner states that *Torres* is inapplicable to a jury finding of an "underlying circumstance" that a prior felony conviction aggravator exists in Florida. *Torres* only applies to the "bare fact" that a prior conviction exists. See *U.S. v. Breitweiser*, 220 F. Supp. 2d 1374 (Georgia Dist. Ct. 2002) [Holding "if a recidivist statute permitted enhancement based on proof of underlying conduct...factual questions could arise as to exactly what conduct the defendant engaged in. Typically, such factual questions are within the province of a jury and this court doubts that the Supreme Court would construe *Torres* as applying to such situations."]

In conclusion, many lower courts in the state and federal jurisdictions are in conflict to the extent of *Torres*. This conflict is centered on the issues of: (1) The relationship of *Torres* to capital sentencing schemes; (2) the finding of aggravating circumstances when a prior felony aggravator exists; (3) whether *Torres* remains good law. See *U.S. v. Davis*, 260 F. 3d

965 (8th Cir. Ct. Appeals 2001). ["A close examination of Supreme Court cases cast further doubt on the future viability of *Almendarez-Torres*."]

Some courts (including Florida) hold that *Torres* means if a prior felony or murder committed during the course of a felony aggravator exists, a trial judge is allowed under *Torres* to constitutionally find other aggravating circumstances. These aggravating circumstances can then be utilized in imposing a death sentence. See *Bottoson v. Moore*, 824 So. 2d 115; *Belcher v. State*, 851 So. 2d 678 (Fla. 2003). [Concluding "*Ring* did not disturb the holding in *Apprendi*, which exempted prior convictions from facts required to be s ubmitted from the jury."]; *Duest v. State*, 2003 Fla. LEXIS 1069; *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003) [Holding "because one of the aggravating circumstances found was a prior violent felony, this aggravator alone clearly satisfies the mandates of the U.S. and Florida Constitutions, and therefore imposition of the death penalty was constitutional"]; *Colorado v. Carrasco*, 2003 Colo. App. LEXIS 1373. ["Defendant contends that *Ring* eliminates the prior conviction exception. We are not persuaded."]; *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2003). ["Once jury finds existence of a least one aggravating circumstance, judge may find other aggravating circumstances not found by jury to impose death."] In contrast, as mentioned earlier, other courts hold the direct opposite. See *Ring v. State*, 65 P. 3d 915 (Ariz. 2003), *Tennessee v. Cole*, 2003 Tenn. Crim. App. LEXIS 1002.

As stated earlier, Florida courts and others have found under *Torres* that a trial judge can find the "underlying facts" of a prior conviction. This allows them to subsequently use said prior conviction as an aggravating circumstance necessary to impose a death sentence. Again, other courts hold the contrary. See *U.S. v. Breitweiser*, 220 F. Supp. 1374 (U.S. Dist. Ct.

Georgia 2002); *Tenn. v. Cole*, 2003 Tenn. Crim. App. LEXIS 1002. ["A disparity of different views exists as to whether the trial judge can decide issues which involve an examination of the underlying facts of a prior conviction."]

With no precise holding from the United States Supreme Court, various courts throughout the United States will continue to construe *Torres* incorrectly. The result will be unmistakable violations of the holdings in *Apprendi* and *Ring*, as well as Sixth, Eighth, and Fourteenth Amendment rights being violated.

In light of the preceding argument, Petitioner requests this Honorable Court grant this writ of certiorari, and further requests a determination of whether Petitioner's sentence and/or conviction was imposed unconstitutionally.

II. FLORIDA'S JUDICIAL WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES IS A FACTUAL DETERMINATION THAT IS NECESSARY TO IMPOSE A SENTENCE OF DEATH IN FLORIDA. THEREFORE, UNDER *RING V. ARIZONA*, THIS "WEIGHING PROCESS" OF AGGRAVATING AND MITIGATING CIRCUMSTANCES SHOULD BE FOUND BY A JURY BEYOND A REASONABLE DOUBT.

Petitioner alleges Florida's capital sentencing statute, as it relates to the judicial finding of "fact" for weighing aggravating and mitigating circumstances, falls under the premise of *Ring* and *Apprendi*. 530 U.S. 466 (2000). [Holding "if a State makes an increase in defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt."]

In *Ring v. Arizona*, the United States Supreme Court held *Ring's* claim is tightly delineated when stating, "He contends only that the Sixth Amendment required jury findings on the aggravating circumstances against him." 536 U.S. 584 (2002). Further, the *Ring* court did not specifically rule on whether the "weighing process" of aggravating and mitigating factors is a "factual determination that makes an increase in a defendant's authorized sentence." Id. By not specifically identifying whether the weighing process is a factual determination necessary to increase a defendant's sentence (and therefore needs to be found by a jury beyond a reasonable doubt), the United States Supreme Court left this question open to much interpretation by the lower courts of the United States.

Petitioner contends the *Ring* holding applies to Florida's "weighing process" of aggravating and mitigating circumstances. In support, Petitioner first cites to Florida's ,capital sentencing statute, which allows a defendant's sentence to be increased from life to death only if: (1) The trial judge finds that aggravating circumstances exist and weighs the aggravating circumstances against the mitigating circumstances, and (2) finds there are insufficient mitigating circumstances to outweigh aggravating circumstances. Fla. Stat. 921.141 (3) (a) (b) (2003). Only if said two judicial determinations are accomplished can a defendant be sentenced to death. Id. Otherwise, a defendant faces only life imprisonment. Id. ["If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with 775.082."] In conclusion, Florida's capital sentencing statute requires a defendant receive sentence of life imprisonment unless the trial judge independently conducts a weighing analysis to

determine whether sufficient aggravating circumstances outweigh mitigating circumstances. Id.

It follows that since Florida law requires a judge to conduct a "weighing process" before a defendant can be sentenced to death, this "weighing process" falls under the ambit of *Ring* and *Apprendi*. 536 U.S. 584 (2002). ["If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact, no mater how the State labels it, must be found by a jury beyond a reasonable doubt."] It logically follows this fact-finding, to survive the constitutional requirements of the Sixth, Eighth, and Fourteenth Amendments, should be found by a jury beyond a reasonable doubt.

The Florida Supreme Court remains opposed to Petitioner's contention that the judicial "weighing process" must be found by a jury beyond a reasonable doubt under *Ring*. For instance, the Florida Supreme Court follows an Eleventh Circuit Court of Appeals opinion in *Ford v. Strickland*, which held:

> "The weighing process is not a factual determination. In fact, the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof...While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard...the relative weight is not." 696 F. 2d 804 (1995).

However, Petitioner contends the Florida Supreme Court is in error when it holds the "weighing process" is not a factual determination. Petitioner cites to the Florida capital sentencing statute itself. "If the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the *facts*: (1) That sufficient

aggravating circumstances exist as enumerated in subsection [5], and (2) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. 921.141 (2002).

Therefore, Florida's own capital sentencing statute holds death shall only be imposed if there are facts that insufficient mitigating circumstances outweigh the aggravating circumstances. Fla. Stat. 921.141 (2003). By its own statutory meaning, said Florida statute requires the trial judge to make a "factual determination" that "there are insufficient aggravators to outweigh mitigators." Id.

Other courts possessing similar capital sentencing language to Florida's have held the "weighing process" is a factual determination subject to a jury determination under *Ring*. For instance, *Johnson v. Nevada* found that Nevada statutory law requires two distinct findings to render a defendant "death-eligible." Id. In particular, the jury panel of judges may impose a sentence of death only if: (1) it finds at least one aggravating circumstance and (2) further finds there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found. Id. The *Johnson* court then held that "this second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, and not merely a discretionary weighing." 59 P. 3d 450 Nev. 2002. The court reasoned that since Nevada's weighing process was required to be made by a jury, because Nevada "made an increase in a defendant's authorized punishment contingent on the finding of a fact, and that fact, no matter how the state labels it, must be found by a jury beyond a reasonable doubt." Id.

The Florida capital sentencing statute requires a factual judicial finding of insufficient mitigators to

outweigh aggravators before death can be imposed. Therefore, the Florida Supreme Court should apply the holding in *Ring* to make this weighing process done and proven by a jury beyond a reasonable doubt. 536 U.S. 584 (2002). [Holding, "the right to a jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. We hold that the Sixth Amendment applies to both."]

Furthermore, the issue regarding whether the weighing process is a factual determination (that needs to be found by a jury beyond a reasonable doubt) is currently being interpreted throughout the United States in conflicting ways. These conflicting interpretations are happening amongst both the state and federal Courts. Said conflict between the courts cannot be resolved in the future without a specific United States Supreme Court ruling. Below are cases Petitioner claims are in direct conflict with one another regarding this issue. As previously stated, it has been held in the Supreme Court of Nevada that the actual weighing process of aggravating and mitigating circumstances is a factual determination under *Ring* and *Apprendi* that must be proven by a jury beyond a reasonable doubt. *Johnson v. Nevada*, 59 P. 3d 450 (Nev. 2002). In contrast is the Court of Appeals of Maryland, *State v. Oken*, 367 Md. 191 (Md. Ct. App. 2001). [Holding "the "weighing process" itself is not a factual determination, and not a "finding" for purposes of *Apprendi*."]; *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2003). ["Also, the weighing process is not a factual determination nor an element of an offense, therefore the jury is not constitutionally obligated to weigh the aggravating and mitigating beyond a reasonable doubt."]; *Brice v. State*, 815 A. 2d 314 (Del.2002). ["The weighing of aggravating

circumstances doesn't increase the punishment, the U.S. Supreme Court does not require a jury finding beyond a reasonable doubt that all aggravating factors found to exist outweigh all mitigating factors found to exist."]; *Woodruff v. State*, 1993 OKCR7. ["The determination of weight to be accorded to the aggravating and mitigating circumstances is not a fact which must be proved beyond a reasonable doubt."]; *Harrison v. State*, 2003 Ala. Crim. App. LEXIS 22. ["The weighing process (of aggravating and mitigating circumstances) is not a factual determination."]; *Ford v. Strickland*, 696 F. 2d 804 (11th Cir. 1983). ["First, that the aggravating factors must outweigh the mitigating factors for imposition of the death penalty under the Florida Statute is not an element of the crime of capital murder in Florida."] These cases represent a small fraction of varying interpretations. If a specific United States Supreme Court ruling is not made, it seems this conflict between the courts will never be resolved.

Lastly, the issue of a "weighing process" is of great national importance. Without a direct ruling on the issue by the United States Supreme Court, any defendant accused of a capital crime could face the possibility of his or her Sixth Amendment rights under the United States Constitution being violated. Further, if this factual determination of finding aggravating circumstances to outweigh mitigating circumstances was performed by a jury, it would help dilute the argument that the death penalty can be imposed arbitrarily. This is because the defendant would then know exactly what aggravating and mitigating factors were found by a jury, who alone has the constitutional responsibility to find the existence of "any fact that increases a defendant's authorized punishment." See *Ring v. Arizona*, 536 U.S. 584 (2002). Moreover, since "death is different," more precaution and guidance should be given to the lower courts. Without guidance, conflicting decisions among

the lower courts will become commonplace, thereby undermining public confidence of America's death penalty schemes.

Based on the above, Petitioner requests the Court grant this Writ of Certiorari to determine whether his sentence and conviction is rested on unconstitutional grounds under the Sixth, Eighth, and Fourteenth Amendments. A determination needs to be made on whether a trial judge, (and not a jury) can independently weigh aggravating and mitigating circumstances, and thereby utilize said weighing process to impose a sentence of death.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests this Court grant Petitioner's Writ of Certiorari. Petitioner requests this Court vacate and remand to the Florida Supreme Court for reconsideration in light of this Court's holdings of *Ring v. Arizona*, *Sattazahn v. Pennsylvania*, and *Apprendi v. New Jersey*.

Respectfully Submitted,

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Supreme Court of Florida

No. SC01-2007

JOHN D. FREEMAN,
Appellant,

vs.

STATE OF FLORIDA
Appellee

[July 11, 2003]

PER CURIAM.

John D. Freeman (Freeman), a death row inmate, appeals an order of the trial court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. See art. V, § 3 (b) (1), Fla. Const. For the reasons more fully set forth below, we affirm the trial court's denial of relief.

The facts, as set forth in Freeman v. State, 761 So. 2d 1055 (Fla. 2000), are as follows:

> John D. Freeman (Freeman) was convicted of first-degree felony murder for the 1986 killing of Leonard Collier (Collier). Freeman was sentenced to death, and both the conviction and sentence were affirmed on appeal. See Freeman v. State, 563 So. 2d 73 (Fla. 1990). Collier caught Freeman in the act of burglarizing his home. Freeman claimed that Collier pointed a gun at him and threatened to shoot him to prevent his escape. The two struggled over the gun and fell outside into the front yard. When Freeman obtained possession of the gun, he used the gun to repeatedly strike Collier in the head ten to twelve times. Collier died from the head wounds. Id. at 1058.

The Collier murder was the second murder that Freeman committed within twenty-two days. The first murder in a similar manner--the victim, Alvin Epps (Epps), came home to find Freeman burglarizing his home and Freeman stabbed him to death. In the Epps case, Freeman was convicted of first-degree murder, the jury recommended a life sentence, the judge overrode the jury recommendation, and this Court reversed the override. Freeman v. State, 547 So. 2d 125 (Fla. 1989).

After Freeman's direct appeal was concluded in the Collier murder, he filed a motion for postconviction relief, which the trial court

summarily denied. See Freeman v. State, 761 So. 2d 1055 (Fla. 2000). Freeman appealed the summary denial of his postconviction motion to this Court, and also filed a petition for a writ of habeas corpus. The cases were consolidated for our consideration. After considering Freeman's appeal, we remanded Freeman's 3.850 motion for an evidentiary hearing on his claim of ineffective assistance of counsel. See id. In all other respects, we affirmed the trial court's denial of Freeman's postconviction motion. We also denied Freeman's petition for a writ of habeas corpus. See id.

The trial court conducted an evidentiary hearing on the remanded claim and denied relief. Freeman now appeals that denial, raising two claims of ineffective assistance of counsel: whether trial counsel was ineffective in the guilt phase of trial for failing to object to the State's alleged improper reliance on racial factors in seeking the death penalty, and whether trial counsel was ineffective in the penalty phase trial for failure to present evidence in mitigation. For the reasons explained below, we affirm the trial court's denial of relief.

Ineffective Assistance at Guilt Phase Trial

Freeman alleges defense counsel was ineffective for failing to argue that the State's decision to pursue the death penalty was based upon improper racial considerations. He claims the prosecutor rejected Freeman's offer to plead guilty in the Epps and Collier cases in exchange for two consecutive life sentences because the State needed to seek the death penalty in more

cases where Caucasian defendants killed African-American victims.

Although the decision to seek the death penalty is within the prosecutor's discretion, that discretion may be curbed by the judiciary where motives such as bad faith, race, religion, or a desire to prevent the defendant from exercising his constitutional rights contributes to the prosecutor's decision. See State v. Bloom, 497 So. 2d 2, 3, (Fla. 1986). Freeman claims that race was the motive behind the prosecutor's decision to seek the death penalty in this case.

At the evidentiary hearing, Freeman presented the testimony of then Assistant State Attorney John Bradford Stetson, Jr., State Attorney Ed Austin, Assistant Public Defender Ann Finnell (who was Freeman's co-counsel at the Epps trial), and Assistant Public Defender Patrick McGuinness (Freeman's trial counsel for both the Collier and Epps murders). The testimony showed that prior to trial, Freeman's trial counsel approached the prosecutor with an offer to plead guilty to both the Epps and Collier murders in exchange for two consecutive life sentences with twenty-five-year mandatory minimum terms. The testimony showed that both parties were aware of the then pending federal case, McCleskey v. Kemp, 481 U.S. 279 (1987). McCleskey involved an allegation that prosecutors were seeking the death penalty disproportionally against African-American defendants. Freeman alleges that when his trial counsel presented the plea offer to the prosecutor, the prosecutor refused the offer for fear that defense attorneys in other cases would argue that he was favoring Caucasian defendants.

Freeman argues that the State relied on race in making its decision, that the reliance created a reverse-McCleskey claim, and that trial counsel was ineffective for failing to raise the claim because he admittedly did not know how to do so.

The trial court found that, although the prosecutor's response to defense counsel's plea offer was "a somewhat ill-considered retort," the evidence demonstrated that the State did not pursue the death penalty based on Freeman's race. The evidence the trial court relied upon included the testimony of Ed Austin, the State Attorney at the time of trial. Austin stated that his office never prosecuted a defendant based on his or her race. At the time of Freeman's trial it was standard policy for him to discuss the case with the prosecutor and determine the elements of the crime, the aggravation and mitigation, and whether the State should go forward and seek the death penalty. Austin commented on the ongoing accusations that his office too often sought the death penalty in cases where the victims were Caucasian and the defendants were African-American. He stated there were a lot of newspaper articles criticizing the State Attorney's Office, but those accusations had nothing to do with the decision to file and prosecute a homicide as a first-degree murder case. The decision to seek the death penalty, Austin stated, was made on the basis of the facts of the case. When Austin was asked about the public's perception of the State Attorney's Office, he stated that perceptions have nothing to do with how a case is prosecuted, or the decision to seek the death penalty, or whether there is aggravation that outweighs mitigation. Austin stated that the only time race

is considered in the prosecution is if race is an element of the crime, and that during his tenure as a State Attorney, his office never filed a case for the wrong reasons. The cases were filed based on the law. Prosecutor Stetson also testified at the evidentiary hearing. He stated that under the facts of this case, irrespective of race, the aggravating circumstances clearly supported the decision to seek the death penalty.

For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to finding of fact based on competent, substantial evidence and independently reviews deficiency and prejudice as mixed questions of law and fact. See Stephens v. State, 748 So. 2d 1028, 1033-34 (Fla. 2000) (setting forth standard of appellate review following an evidentiary hearing on motion based on ineffective assistance of counsel claims); see also State v. Reichmann, 777 So. 2d 342 (Fla. 2000); Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000) ("[W]e review the prongs of ... ineffective assistance of counsel as questions of mixed law and fact."). Therefore, we give deference to the finding of fact regarding the conversations between the prosecutor and defense counsel, the conversations between the prosecutor and the State Attorney, and the testimony as to how and why the State chose to seek the death penalty in this case. The trial court's finding that the State did not prosecute Freeman because of his race is based on competent, substantial evidence in the record.

Next, we review whether these findings constitute a deficiency in performance that

prejudiced Freeman. This Court reviews de novo the issue of whether defense counsel was deficient at trial and, if so, whether the defendant was prejudiced. See Stephens, 748 So. 2d at 1033-34. Freeman argues that defense counsel was ineffective because he admittedly did not know what legal mechanism to employ to address the issue of the prosecutor's perceived reliance on race as a factor in the decision to seek the death penalty.

As stated in Stewart v. State, 801 So. 2d 59, 64-65 (Fla. 2001), for a defendant to succeed in his ineffectiveness claim, he must satisfy two elements: first, he must show that counsel's performance was deficient; and second, he must show that the deficient performance prejudiced the defense. In order to prove these elements, a defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that counsel's errors were so serious as to deprive the defendant of a fair trial where the result was reliable. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984). "[W]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Stewart, 801 So. 2d at 65; see also Strickland, 466 U.S. at 697 ("[T]here is no reason for a court deciding an effective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one."); Downs v. State, 740 So. 2d 506, 518 n. 19 (Fla. 1999) (finding no need to address prejudice prong where defendant failed to establish deficient performance prong).

Even if we assume defense counsel was deficient in his inability to address this issue at the time of trial, Freeman has failed to establish that the State relied on race when it decided to seek the death penalty, and thus has not demonstrated prejudice. The testimony establishes only that the prosecutor was aware of the McCleskey issue and perceptions and accusations made about his office. State Attorney Austin confirmed that race was not a factor in deciding to seek the death penalty in Freeman's case. The trial court accepted this testimony as true, and there is nothing in the record to refute it. The trial court's finding that the prosecutor did not rely on this defendant's race in seeking the death penalty is supported by the competent, substantial evidence in the record. Therefore, we find no error in the trial court's denial of relief on this claim.

Ineffective Assistance of Counsel at the Penalty Phase Trial

Freeman claims defense counsel was ineffective in the penalty phase trial for failing to investigate and present to the jury mitigating evidence from friends and family about Freeman's abusive home life, for failing to have mental health experts review his family history and present this evidence along with evidence of alcohol and drug abuse, and for failing to present the live testimony of David Sorrells, Freeman's best friend, who would have testified to abuse Freeman suffered as a child.

As stated above, for Freeman to succeed on an ineffectiveness claim, two elements must be satisfied. First, he must show that counsel's performance was deficient, or that counsel made errors so serious that he or she did not function as the "counsel" guaranteed by the Sixth Amendment. Second, he must show that the deficient performance prejudiced the defense. See Stewart v. State, 801 So. 2d 59, 64-65 (Fla.2001). This second prong requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial with a reliable result. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984). The trial court considered each of the alleged deficiencies and found that trial counsel was not deficient. We agree.

Lay Witnesses

Defense counsel McGuinness testified at the evidentiary hearing that he made the decision present the same mitigation at this trial as he presented in the Epps trial, in the Epps trial, the jury recommended a sentence of life imprisonment. The only witnesses he called in the penalty phase were Mary Freeman (Freeman's mother), Robert Jewell (Freeman's brother), and David Sorrells (Freeman's friend). Sorrells did not testify live at trial, but the transcript of his testimony from the Epps trial was read to the jury. Defense counsel stated that he believed part of the evidence in the penalty phase trial included evidence that Freeman was abused by his stepfather. As for evidence that Freeman's sister was sexually abused by Freeman's stepfather,

defense counsel testified that he did not have this information, and he admitted he never spoke to Freeman's sister. He stated that he would have put on evidence of sexual abuse only if he could have linked it to Freeman. He also stated that he knew of Freeman's use of drugs and alcohol, but did not use that information in mitigation because he could not link it to the crime. He admitted that perhaps he should have "delved" more deeply into Freeman's drug and alcohol abuse.

Freeman argues that defense counsel should have presented more evidence in mitigation, arguing that the result at trial would have been different if the jury had heard about the scope of physical and sexual abuse in the Freeman household.

The facts do not support the allegation that Freeman was sexually abused or was aware that his sister was sexually abused. To find that trial counsel was deficient in failing to present evidence of physical and sexual abuse, Freeman must first show that a reasonable investigation would have uncovered the evidence. See Gorby v. State, 819 So. 2d 664, 676 n.11 (Fla. 2002) (finding that trial counsel was not ineffective for not presenting evidence of the defendant's childhood sexual abuse where there was no evidence that such abuse occurred). The record in this case does not demonstrate that any of the witnesses or potential witnesses knew of the evidence of sexual abuse or would have told defense counsel about it if they did know. Freeman's sister testified at the evidentiary hearing that she kept the abuse to herself until

"later." She testified that her mother knew of the abuse at the time of Freeman's trial, but Freeman's mother did not volunteer this information to counsel.

The trial court found that the testimony presented at the evidentiary hearing did not demonstrate physical abuse to the extent that Freeman claims it occurred during his childhood. Each witness testified to single incidents of punishment that each said occurred after Freeman misbehaved. The trial court acknowledged the testimony of Freeman's neighbors, Mary Holliman and Bobbie Hart, who both described an incident where Freeman was whipped with a rubber hose. However, the severity of Freeman's claimed abuse was tempered by the testimony of Mitchell Tanner and Dwayne Watson, who stated that Freeman grew up like "all the rest of us," that Freeman got into trouble and stayed out with his friends past his curfew, and that Freeman knew when he went home he would have to face his stepfather. Freeman's neighbor, James Holliman, testified that he would hear Freeman and his brother yell, "I won't do it anymore." And Freeman's aunt, Sonja Bigdon, testified that Freeman's stepfather yelled, as did Freeman's mother, but that his stepfather loved Freeman in his own way and was good to Freeman at times.

While additional evidence regarding specific examples of abuse could have been presented, that is not the standard Strickland contemplates in evaluating counsel's performance. See Gudinas v. State, 816 So. 2d 1095, 1106 (Fla. 2002) (finding that trial counsel was not

ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation); see also Cherry v. State, 781 So. 2d 1040, 1051 (Fla. 2000) ("[E]ven if trial counsel should have presented witnesses to testify about Cherry's abusive background, most of the testimony now offered by Cherry is cumulative ... Although witnesses provided specific instances of the abuse, such evidence merely would have lent further support to the conclusion that Cherry was abused by his father, a fact already known to the jury.").

The trial court acknowledged that the witnesses' combined testimony demonstrated that Freeman's stepfather was overly zealous in his punishment, but the court also noted that the punishment described in the testimony was in response to Freeman's misbehavior. Further, as the trial court found, the information presented at the evidentiary hearing was "largely cumulative" to that evidence presented at trial, and that the combined testimony would not have outweighed the statutory aggravating circumstances.

It is clear that the testimony that Freeman suffered some physical abuse at the hand of his stepfather. In fact, the jury recommendation of life in the Epps trial was based in part on the "history of abuse during Freeman's childhood." Freeman, 547 So. 2d at 129. However, the fact that Freeman was physically abused by his stepfather was a fact made clear to this jury at trial. Freeman's brother and mother, as well as Dr. Louis Legum, a mental health expert, told the jury that Freeman was abused by his stepfather. In fact, the trial court accepted the nonstatutory

mitigating factor of abuse by Freeman's stepfather.

Although the evidence presented at the postconviction hearing may have painted a clearer picture as to the extent of the abuse, trial counsel is not ineffective if he adequately made the point. See Jennings v. State, 583 So. 2d 316, 321 (Fla. 1991) ("It is not negligent to fail to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if he believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position."). Even if counsel's failure to demonstrate the abuse with greater detail can be considered error, it would be harmless because the abuse Freeman suffered as a child was found as a mitigating factor.

Expert Testimony

Freeman also called a number of friends and family members to testify at the evidentiary hearing. The testimony showed that Freeman suffered a head injury when a neighbor accidental backed over him with a car when he was about two years old, and another head injury after falling off a bicycle. At the evidentiary hearing, defense counsel testified that there were no medical records available to indicate the nature or severity of either of the head injuries, the hospital records had been destroyed, and the treating physician had no recollection of the injuries. Freeman then presented Dr. James E. Larson as an expert witness in forensic psychology to testify that Freeman suffered from a "mild neuropsychological impairment" and a "learning

disability." Dr. Larson administered certain tests to Freeman and testified that Freeman performed poorly.

The trial court found that there was no materially significant information Dr. Larson possessed that defense counsel did not provide Dr. Legum at trial. The trial court also held that because Dr. Legum did not testify at the evidentiary hearing, there was no evidence that Dr. Legum's testimony at trial would have been any different had he been given Dr. Larson's information. Based on these facts, the trial court found that there was no showing that trial counsel was deficient. See Porter v. State, 788 So. 2d 917 (Fla. 2001) (finding that this Court will not substitute its judgment for trial court's judgment on questions of fact, credibility of witnesses, and weight of evidence); see also Cherry v. State, 781 So. 2d 1040 (Fla. 2000); Whitfield v. State 706 So. 2d 1 (Fla. 1997).

The trial court then considered the second prong in Strickland and held that Freeman demonstrated no prejudice. The trial court found that Dr. Larson's opinion that Freeman possessed a "mild neuropsychological impairment" was based on his speculative assessment of a combination of factors, which was subject to impeachment by the State. Furthermore, both Dr. Larson and Dr. Legum would have testified that Freeman suffered from "anti-social personality disorder" which is a trait most jurors tend to look disfavorably upon. At best, the trial court found, Dr. Larson's testimony would have established nonstatutory mitigation. See Blackwood v. State, 777 So. 2d 3999 (Fla. 2000)

(finding that trial court properly rejected statutory mental mitigators where mental health expert testified that defendant suffered from mental disturbance which was not extreme"); see also Mahn v. State, 714 So. 2d 391 (Fla. 1998); Foster v. State, 679 So. 2d 747 (Fla. 1996); Johnson v. State, 660 So. 2d 637 (Fla. 1995). The trial court concluded that Freeman's claim failed both prongs of the Strickland test for ineffective assistance of counsel.

We accord to the trial court's findings of fact, and will uphold them if the facts are based on competent, substantial evidence. See Stephens v. State, 748 So. 2d 1028, 1033-34 (Fla. 1999). The facts the trial court relied upon are supported by competent, substantial evidence in the record. Defense counsel testified at the postconviction hearing that he provided Dr. Legum with Freeman's school records, juvenile records, background information from his files, and any other information he obtained as he acquired it. Defense counsel informed Dr. Legum that Freeman was sent to the hospital on a suicide watch prior to trial. Dr. Larson's testimony as the postconviction hearing was substantially similar to Dr. Legum's testimony at trial. Both experts testified to Freeman's IQ, intellectual capabilities, and performance on achievement tests. The fact that Freeman found a new expert to provide more favorable mental health testimony does not, in itself, render trial counsel deficient. See Gaskin v. State, 822 So. 2d 1243 (Fla. 2002) (holding counsel's reasonable mental health investigation was not rendered incompetent merely because defendant later secured testimony of more favorable mental health expert and where expert's

opinion at evidentiary hearing was cumulative to that already presented to trial court.

The trial court's finding that Freeman's school records, juvenile records, and other information in trial counsel's files were given to the trial expert is supported by the competent, substantial evidence in the record based on trial counsel's own testimony that he provided this information. The facts in the record do not support Freeman's claim that his trial counsel was deficient in failing to provide the trial expert with pertinent background information, and relief on this claim is therefore denied.

Failure to Subpoena David Sorrells

Freeman claims that is was crucial to his defense that David Sorrells, his best friend from childhood, testify live at his trial. Sorrells testified live at the Epps trial. Defense counsel did not subpoena Sorrells for trial in this case because he perceived Sorrells as a friendly witness and expected Sorrells would testify voluntarily. However, when the penalty phase trial began, defense counsel could not locate Sorrells. Counsel sent Freeman's brother to Sorrells' house and left a message with Sorrells' girlfriend. Counsel sought a continuance to find Sorrells and bring him into the courtroom to testify, telling the judge that he knew where Sorrells worked and could find him there. However, because Sorrells had not been subpoenaed, the trial judge refused to continue the penalty phase trial. The trial judge had

counsel read Sorrells' testimony from the Epps trial to the jury, and instructed the jury to accept the testimony as if Sorrells has presented it live.

Sorrells testified at the evidentiary hearing. He stated that he had not been contacted to testify at the trial, but would have done so. Freeman now argues that Sorrell's testimony should have been presented live, and when considered in conjunction with the failure of trial counsel to present other lay testimony, there was clear prejudice. He argues that without Sorrells' testimony along with the testimony of other friends and neighbors, the jury believed that only family members were willing to testify favorably about his character, and the jury never understood that he is a human being with positive characteristics.

Sorrells testified at the Epps trial about two incidents of physical abuse Freeman suffered. At the evidentiary hearing Sorrells stated that had be been called as a live witness, he would also have testified that Freeman was a hard worker, Freeman enjoyed children, and he was well-mannered. He would have also added that Freeman's stepfather was "a pretty rowdy fella."

Counsel's failure to subpoena a defense witness is not prejudicial where the testimony is presented to the jury by other evidence. See Melendez v. State, 612 So. 2d 1366, 1368 (Fla. 1992) (rejecting a claim of ineffectiveness of counsel for failure to subpoena defense witness because, when witness failed to appear, trial counsel was able to get testimony before jury by way of stipulation). In this case, Sorrells'

testimony was presented by reading the transcript of his prior testimony.

Furthermore, as the trial court found, trial counsel's failure to subpoena Sorrells was a tactical decision to prevent the State from knowing who the defense witnesses were. Although trial counsel stated that he did not subpoena Sorrells because he thought Sorrells would voluntarily appear, he also stated that, at the time of this trial, there was no discovery regarding penalty phase witnesses and if he did not subpoena a witness, the prosecutor would not know who his witnesses would be. Trial counsel stated, "I saw no reason to assist the State in preparing to meet any of my witnesses." Thus, the trial court's finding that this was a tactical reason is supported in the record.

As this court stated in Occhicone v. State, 768 So. 2d 1037 (Fla. 2000):

> In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel at the penalty phase, [the defendant] must show "both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different."

Id. at 1049 (quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996). The evidence Freeman now presents as evidence in mitigation would not alter the balance of the aggravating and mitigating circumstances. There were three aggravating circumstances found: (1) Freeman was previously convicted of first-degree murder, armed robbery, and burglary of a dwelling with an assault (the Epps case); (2) Freeman committed the Collier murder during the commission of a burglary of a dwelling; and (3) Freeman committed the crime for pecuniary gain. There were no statutory mitigators found. Four nonstatutory mitigators were found: (1) Freeman was of low intelligence; (2) he had been abused by his stepfather; (3) he possessed some artistic ability; (4) he enjoyed playing with children. Every item Freeman presents as mitigation in this postconviction proceeding was considered by the jury at trial. The fact that Freeman's postconviction counsel can support the mitigation with stronger evidence would not, with reasonable probability, alter the balance of the aggravating and mitigating circumstances. The trial court properly denied relief on this claim.

Therefore, based on the foregoing, we hereby affirm the trial court's denial of postconviction relief.

It is so ordered.

ANSTEAD, C.J., WELLS, PARIENTE, LEWIS, QUINCE, and CANTERO, JJ., and SHAW, Senior Justice, concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Duval County,

Donald R. Moran, Jr., Judge - Case No. 86-11599-CFA

Michael P. Reiter, Capital Collateral Regional Counsel - North, Harry P. Brody, Assistant CCRC - N and Jeffrey M. Hazen, Assistant CCRC - N, Office of the Capital Collateral Regional Counsel, Jacksonville, Florida,

for Appellant

Charles J. Crist, Jr., Attorney General, and Charmaine M. Millsaps, Assistant Attorney General, Tallahassee, Florida,

for Appellee

IN THE CIRCUIT COURT,
FOURTH JUDICIAL
CIRCUIT, IN AND FOR
DUVAL COUNTY,
FLORIDA.

CASE NO.: 86-11599-CF
DIVISION: CR-E

STATE OF FLORIDA,
Petitioner,

v.

JOHN D. FREEMAN
Defendant.
_____/

SECOND ORDER DENYING DEFENDANT'S FIRST MOTION FOR POST-CONVICTION RELIEF

This matter is before this Court on the defendant's "Amended Motion To Vacate Judgments of Conviction and Sentence" filed on October 25, 1995, upon remand by the Supreme Court of Florida in Freeman v. State, 761 So. 2d 1055 (Fla. 2000)(Mandate issued on July 10, 2000), for the purpose of holding an evidentiary hearing on the specific matters set forth in this opinion. As a result of this Court's substantial accommodations to the defendant, the evidentiary hearing was finally held on July 16 - 17, 2001.

The Supreme Court of Florida's opinion set forth five issues that the defendant could present

evidence in support of at the evidentiary hearing, all of which are related to the penalty phase of the trial. Four of the issues relate to the assistance of his two trial counsel and one of the issues is a due process issue related to the State's decision to pursue the death penalty. This Court will address each of the issues in the approximate order in which they were addressed at the evidentiary hearing.

ISSUE ONE

The defendant raised the due process allegation that the State improperly used race as a motivating factor in deciding to pursue a death sentence in this case. In order to prevail on this claim, the defendant was required to show that the State used the defendant's race as a motive for seeking the death penalty. Freeman, 761 So. 2d at 1068; McClesky v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L.Ed.2d 262 (1987).

The defendant presented the testimony of then Assistant State Attorney (now Circuit Court Judge) John Bradford Stetson, Jr., then State Attorney Ed Austin, Assistant Public Defender Ann Finnell (who was the defendant's co-counsel on the Epps murder), and Assistant Public Defender Patrick McGuinness (who was the defendant's lead trial counsel on both the Epps and the Collier murders) as to this issue. The testimony of these witnesses established that as a result of the strength of the State's case as to the Collier murder, and the likelihood of a death sentence in that case, Mr. McGuinness went to Mr. Stetson and proposed a plea agreement as to both murder cases, whereby the defendant would

plead guilty to both murders and be sentenced to consecutive life sentences with 25 year minimum mandatory terms. The testimony established an awareness by counsel for the parties of then pending Federal litigation in which studies were used to support an allegation that prosecutors were seeking the death penalty disproportionally against black defendants. Ms. Finnell and Mr. McGuinness testified that Mr. Stetson responded to the defendant's plea offer by stating that if he accepted the offer, counsel for the defense would use that fact to support future allegations of discriminatory application of the death penalty against black defendants.

Even assuming that Mr. Stetson responded to the defendant's plea offer as Mr. McGuinness indicated, this Court finds that the response was nothing more than a somewhat ill-considered retort to then existing allegations of racial discrimination in the application of the death penalty by prosecutors (of an opposite nature to the instant facts), and that the evidence not only failed to demonstrate a racially motivated purpose in pursuing the death penalty in this case, but rather, it demonstrated that the State Attorney's Office did not pursue the death penalty in this case based on the race of this defendant (who is white). The testimony of Mr. Stetson and Mr. Austin established that as a matter of established office policy the decision to pursue a First Degree Murder charge and a death sentence was the result of a review of the facts of the case and the aggravating factors of the case by the State Attorney's Office's "Homicide Team." The Homicide Team was compromised of Division Chiefs and the senior homicide prosecutors

within the office. Mr. Stetson testified that the Homicide Team voted unanimously to seek the death penalty in light of the strength of the facts and the aggravating circumstances in this case. This was the *second* case in which this defendant went to the home of an innocent home owner with the intent to burglarize the home and then brutally murdered the home owner while committing the burglary. The Homicide Team's recommendation was then subject to review by the State Attorney. Mr. Austin testified that his office never prosecuted a defendant because the defendant was white or black, and that he did not allow public sentiment to influence the prosecution of cases. This Court finds that the evidence refutes the defendant's claim that the State used his race as a motivation for pursuing the death penalty.

ISSUE TWO

That the defendant's attorneys rendered ineffective assistance of counsel by allegedly failing to adequately provide his mental health expert with sufficient information to allow the expert to provide a competent evaluation. In order to prevail on a claim of ineffective assistance of counsel it is the defendant's burden to show: 1. That counsel's performance was outside the wide range of reasonable professional assistance, i.e., that no reasonable attorney would have done what counsel did under the circumstances; and 2. That counsel's deficient performance prejudiced the outcome of the proceeding, i.e., that there is a reasonable probability that the outcome of the proceeding would have been different absent counsel's

deficient performance. Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1986); Rogers v. Zant, 13 F.3d 384 (11th Cir. 1994); Rutherford v. State, 727 So. 2d 216 (Fla. 1998); Cherry v. State, 659 So. 2d 1069 (Fla. 1995).

The defendant presented the testimony of a number of family members and family friends that the defendant had suffered a "head injury" as a result of a neighbor accidentally backing over him with a car when he was approximately two years of age, and that he suffered another head injury when he fell off a bicycle when he was a child. However, there were no medical records available to indicate the nature or severity of either of these head injuries. The defendant then used the testimony of Dr. James E. Larson (whom the Court accepted as an expert in forensic psychology) to note the defendant's poor performance in school and his performance on tests administered by Dr. Larson and his staff some six years after the offense in this case. Dr. Larson offered his opinion, through his assessment of the combined effects of all the circumstances brought to his attention (including his examination of the defendant), that the defendant possessed a "mild neuropsychological impairment," as well as a "learning disability." However, Dr. Larson also acknowledged that he is not a medical doctor nor a neurologist, and he stated his belief that his evaluation of a brain disorder was more accurate than would be actual medical evidence.

Initially, this Court finds that the evidence not only failed to establish that counsel's

performance was deficient, it refuted that claim. The State presented the testimony of Mr. McGuinness, the defendant's trial counsel. Mr. McGuinness delineated what information he had provided to the defendant's mental health expert, Dr. Louis Legum. This Court finds that there was no materially significant information that was presented at the hearing that was not presented to Dr. Legum. Moreover, the defendant failed to call Dr. Legum as a witness at the hearing, for the purpose of establishing that the proffered evidence had not been presented to him, *or* that the allegedly unknown information would have altered Dr. Legum's testimony at the time of the defendant's trial. Indeed, the defendant presented no evidence that Dr. Legum's evaluation or opinions were actually incompetent. The fact that the defendant has now found a different expert who is willing to provide opinions that may be mildly favorable to him is of no moment, as that fact does not demonstrate incompetence on the part of either his attorney or his mental health expert. Porter v. State, 26 Fla. L. Weekly S321, 2001 WL 459872 (Fla. May 3, 2001); Cherry v. State, 781 So. 2d 1040 (Fla. 2000); Whitfield v. State, 706 So. 2d 1 (1998).

Additionally, this Court finds that the defendant has failed to show actual prejudice as a result of this claim. Dr. Larson's opinions would have, at best, established non-statutory mitigation and not statutory mitigation. Blackwood v. State, 777 So. 2d 399 (Fla. 2000); Mahn v. State, 714 So. 2d 391 (Fla. 1998); Foster v. State, 679 So. 2d 747 (Fla. 1996); Johnson v. State, 660 So. 2d 637 (Fla. 1995). Indeed, Dr. Larson's opinion that the defendant possessed a

"mild neuropsychological impairment" was based on his (speculative) assessment of a combination of factors, which assessment was subjected to impeachment by the State. There was absolutely no medical evidence in support of his assessment and there was evidence in the defendant's school records which refuted the assessment. Additionally, a jury would have heard testimony from both Dr. Legum and Dr. Larson that the defendant has an "anti-social personality disorder," a trait that *jurors* do not tend to look favorably upon, even if the courts are willing to consider the trait as a potentially mitigating circumstance. Therefore, this Court finds that there is no reasonable probability that the jury would have recommended a life sentence if it had been presented with the facts considered by and opinions of Dr. Larson. Assay v. State, 769 So. 2d 974 (Fla. 2000).

ISSUE THREE

That counsel allegedly rendered ineffective assistance of counsel by failing to present expert testimony regarding the effects of his "drug and alcohol abuse." The defendant presented the testimony of family members and family friends that the defendant *used* alcohol, marijuana and cocaine, but there was no testimony as to how often or for how long the defendant used alcohol or drugs, such that the evidence established actual alcohol or drug abuse. Indeed, the witnesses who testified regarding the drinking with the defendant did *not* characterize the defendant's alcohol usage as somehow excessive.

First, this Court finds that the evidence refuted the defendant's claim that counsel's

performance was deficient in failing to even present evidence that the defendant used or abused alcohol or drugs. Counsel testified that he was aware of the defendant's use of alcohol and drugs, including the fact that the defendant had smoked a marijuana cigarette on the morning of the murder. However, counsel also testified that he chose not to present evidence of the defendant's alcohol and *illegal* drug usage, because jurors do not look favorably upon such information, and because he had nothing with which to connect that information to the defendant's commission of the instant offense, such that *jurors* might find that information favorable to the defendant, as opposed to unfavorable. Counsel testified that the defendant had no prior alcohol or drug related offenses and that the defendant had only smoked *a* marijuana cigarette on the morning of the offense, and not at the time of the offense. Additionally, counsel testified that his theory of the defense was that the defendant was engaging in rational thought and that the defendant did not intend to kill the victim, as was evidenced by the fact that the defendant did not shoot the victim when he obtained possession of the firearm, but rather, he hit the victim in a claimed attempt to get away from the victim. Given this theory, counsel argued that the jury should only find the defendant guilty of second degree murder. Presenting evidence of the defendant's illegal drug usage would have been diametrically opposed to the defense's assertion of rational thought. This Court finds that counsel's strategic decision not to present evidence of the defendant's alcohol and drug abuse was reasonable under the facts of this case. Maharaj v. State, 778 So. 2d 944, 951 (Fla.

2000)(stating, "In *Medina v. State*, 573 So. 2d 293, 297 (Fla. 1990), this Court recognized that counsel cannot be ineffective for strategic decision made during a trial.").

Second, this Court will also note that the defendant did not present testimony at the evidentiary hearing from an expert to testify regarding the effects of the defendant's alcohol and drug abuse. This Court finds that the defendant failed to prove that counsel's performance was deficient for this reason as well.

ISSUE FOUR

That counsel was ineffective for failing to present the testimony of friends and neighbors regarding the defendant's abusive childhood, at the hands of his stepfather, Charles Sorrels (who is no longer living). The Supreme Court of Florida specifically noted (in footnote nine, at pages 1064-1065 of its opinion), the allegation that the defendant suffered a severe head injury as a child when he was run over by a car; as well as the fact that there was nothing in the record to show whether counsel was aware of this information, or if counsel made a strategic decision not to use it.

As to the allegation of child abuse (as presented through the testimony of Mary Holliman, Danette Rucker, Sherry Raymond, Faith McQueen, James Holliman, Joanne Sorrells, Zack Marchalleck, Mitchell Tanner, Bobbie Hart, and Sonja Bigdon), this Court will note that while a combination of the respective testimony may have established overzealous punishment by the defendant's stepfather, most

of the witnesses, including the defendant's neighbors (Mary Holliman and Bobbie Hart) only testified regarding single incidents of extreme punishment (most of which were in regard to the same act of whipping the defendant with a rubber hose). The majority of those incidents were testified to, in total, by defendant's brother at the defendant's trial. Although the defendant contends that his stepfather was simply abusive, this Court finds that the combined testimony of the witnesses refutes this allegation. The testimony of Mitchell Tanner and Dwayne Watson established that the defendant grew up like "all of the rest of us." The defendant got into trouble and stayed out with his friends past his established curfew, even though he knew he would incur the wrath of his stepfather once he got home. The defendant's next door neighbor, James Holliman, testified that he would hear the defendant and his brother yelling, "I won't do it any more, I won't do it any." The defendant's aunt, Sonja Bigdon, testified that while the stepfather was always yelling at the defendant and his brother, he loved them in his own way, and that at times he was very good to them. Ms. Bigdon also testified that the defendant's mother also yelled and screamed at the defendant and his brother. Thus, while the witnesses' combined testimony of several incidents established that the defendant's stepfather was overzealous in his punishment of the defendant, the combined evidence also established that the defendant engaged in conduct that drew that punishment. First, this Court finds that the evidentiary hearing testimony of the defendant's attorney, Mr. McGuinness, and then the defendant's brother, Robert Jewell, established that counsel's

investigation as to mitigating evidence was not deficient. Counsel's testimony also established that the failure to present the testimony of some of these witnesses was a strategic decision. Second, this Court finds that this evidence was largely cumulative to the testimony presented at the defendant's trial, and further, that the combined effect of the additional testimony would not have garnered any additional mitigating weight over the evidence that was presented at trial; nor is there any reasonable probability that the jury would have found the combined weight of the mitigating facts to out-weigh the statutory aggravators. In making that finding, this Court has also taken into account the additional testimony of several of the witnesses regarding the defendant's acts of kindness towards them or their children (at least until the defendant was fifteen years of age).

The defendant also presented the testimony of his sister, Danette Rucker, and her "best friend," Bobbie Hart, that Ms. Rucker was sexually abused by the defendant's stepfather, in order to suggest that the stepfather (who is deceased) was simply abusive. Assuming, arguendo, that this testimony would have been admissible, this Court finds that the testimony of these two witnesses established that this evidence was not "available" at the time of the defendant's trial. Ms. Rucker testified that she intentionally repressed any memory of this information and that she only "recently" recalled it. She also testified that she never told her brothers or her mother about this information. Both Mr. Rucker and Ms. Hart testified that Ms. Rucker eventually told Ms. Hart about the sexual abuse, with the

understanding that she did not want anyone else to know about this information. Ms. Rucker testified, in effect, that the public had no right to know of her sexual abuse and that she did not want anyone to know. Accordingly, this Court finds that this information was not available at the time of this trial and that counsel's performance was not deficient in failing to discover it.

The defendant also presented the testimony of Danette Rucker, Faith McQueen, Robert Jewell and Dwayne Watson, regarding three incidents in which the defendant incurred a head injury. Ms. Rucker and Mr. Jewell testified that the defendant was accidentally backed over with a car by a neighbor when he was two years old. Both witnesses testified that they did not recall much about the incident. There were no medical records available as to the nature or severity of any head injury that the defendant may have suffered. Ms. Queen, the defendant's girlfriend for a period of time, testified that the defendant had once told her that his stepfather knocked him unconscious for losing a school bus fight. Mr. Watson testified that, while a child, the defendant road his bike off a ramp and fell, and that the defendant did not move for about a minute. Based on the testimony of the defendant's attorney and that of Robert Jewell, this Court finds that counsel's investigation was not deficient in regard to this evidence as well. Counsel testified that he was aware of the car accident -but that there were no medical records available regarding the accident - with which to be able to establish the nature and severity of any head injury and the defendant's commission of

the two murders. Although the defendant suggested that his trial counsel should have used the defendant's school records to come to the same assumption that Dr. Larson testified to - that the defendant had a mild neuropsychological impairment, counsel testified that he made the strategic decision not to attempt to suggest this to the jury because the school records also contained negative information which would have been harmful to the presentation of his defense (additionally, this Court will note that even Dr. Larson admitted that the best evidence that the defendant had suffered some form of actual brain trauma would have been the medical records at the time of the accident). Counsel noted that the school records contained opinions of school personnel that the defendant was lazy and uncooperative. This Court finds counsel's strategic decision not to present this evidence and theory to have been reasonable under the totality of the facts of this case. That finding is not diminished by the virtue of the testimony of the two other incidents. There were no medical records to show the nature or severity of any actual brain trauma as to those incidents as well. Moreover, not a single witness testified that the defendant showed signs of some form of impairment following the incidents (let alone signs of permanent impairment). Therefore, this Court finds that counsel's performance was not deficient in regard to this issue. This Court also finds that there is no reasonable probability, under the totality of the facts, that the jury would have found the mitigating evidence to have outweighed the overwhelming combined weight of the statutory aggravators.

ISSUE FIVE

That counsel rendered ineffective assistance of counsel by failing to subpoena a witness, David Sorrells. Sorrells had testified at the penalty phase of defendant's Epps murder trial, regarding the defendant's abused childhood. When Sorrells could not be located at the time of the penalty phase in the instant case, his testimony in the Epps trial was read to the jury. The defendant alleges that because the jury in the Epps case recommended a life sentence, Sorrells' live testimony may have had a greater impact on the jury in the instant case. The defendant presented Sorrell's live testimony at the evidentiary hearing. Sorrells acknowledged that he did not testify to anything that he had not testified to at the Epps murder trial.

First, this Court finds that the evidence failed to show that counsel's performance was deficient. Counsel testified to (as a tactical matter) he did not subpoena witnesses for the penalty phase that he had previously had cooperative contact with, so as not to put the State on notice of who his penalty phase witnesses would be (a tactic similarly used by the State). Counsel testified that he was using the defendant's brother, with whom Sorrells was also a friend, to obtain Sorrell's presence at the instant trial [oddly enough, the defendant never had Sorrells testify why he was not present at the time of this trial or where he was. See, Johnson v. State, 769 So. 2d 990, 1002 - 1003 (Fla. 2000).]. This Court finds that counsel's tactical decision not to subpoena Sorrells was not outside the wide range of professionally competent

assistance under the facts of this case. Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000).

Second, this Court finds that there is no reasonable probability the jury would have recommended a life sentence if it heard Sorrells' live testimony, as opposed to having Sorrells' testimony read to them. Sorrells did not testify at the evidentiary hearing to anything that he did not testify to at the Epps murder trial. Sorrells' (read) testimony was largely cumulative to the *live* testimony of the defendant's own mother and brother, who obviously had first hand information as to the subject matter of the testimony. The testimony of the defendant's abusive childhood was *uncontested* by the State and this Court found the defendant's abusive childhood to be a mitigating factor. Having witnesses Sorrells' live testimony, this Court finds that his live testimony would have had little or no impact on the jury's decision making process given the circumstances noted in this paragraph, and further, that there is no reasonable probability that his live testimony would have out-weighted the aggravating circumstances of the Epps murder conviction, such that the jury would have recommended a life sentence under the totality of the circumstances in this case. Ventura v. State, 26 Fla. L. Weekly S361, 2001 WL 543668 (Fla. May 24, 2001); Valle v. State, 788 So. 2d 960, 966 (Fla. 2001); Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2001); Assay v. State, 769 So. 2d 974, 987 - 988 (Fla. 2000).

Based on the above, it is:

ORDERED AND ADJUDGED that the defendant's Amended Motion to Vacate Judgments of Conviction and Sentence is **DENIED**. The defendant shall have thirty (30) days from the date that this Order is filed in which to take an appeal, by filing a Notice Of Appeal with the Clerk of this Court.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this *24th* day of *July*, 2001.

s/ Donald R. Moran
DONALD R. MORAN, JR.
CIRCUIT JUDGE

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing has been sent to counsel for defendant by U.S. Mail on this *25th* day of *July*, 2001.

s/ Mary Lou Martinson
Mary Lou Martinson
Judicial Assistant

Case No.: 86-11599-CF

SUPREME COURT OF FLORIDA

TUESDAY, NOVEMBER 25, 2003

CASE NO.: SC01-2007

Lower Tribunal NO.: 86-11599-CF

JOHN D. FREEMAN VS. STATE OF FLORIDA

Appellant(s) Appellee (s)

Appellant's Motion for Rehearing is hereby denied.

ANSTEAD, C.J., and WELLS, PARIENTE, LEWIS, QUINCE AND CANTERO, JJ., concur.

A True Copy
Test:

s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

Tc
Served:

JAY TAYLOR
FRANK J. TASSONE, JR.
CHARMAINE M. MILLSAPS
HON. DONALD R. MORAN, JR., CHIEF JUDGE
HON. JIM FULLER, CLERK

(2)

Supreme Court, U.S.
FILED
MAR 2 4 2004
OFFICE OF THE CLERK

Case No. 03-1196

IN THE SUPREME COURT OF THE UNITED STATES

JOHN D. FREEMAN,

Petitioner,

vs.

JAMES V. CROSBY, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

[Restated]

Whether certiorari review should be granted on a claim only presented to the state court in a motion for rehearing?

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Case No. 03-1196

IN THE SUPREME COURT OF THE UNITED STATES

JOHN D. FREEMAN,

Petitioner,

vs.

JAMES V. CROSBY, JR.,

Respondent.

OPINION BELOW

The decision of which Petitioner seeks discretionary review is reported as *Freeman v. State*, 852 So.2d 216 (Fla. 2003).

JURISDICTION

The opinion issued on July 11, 2003. Petitioner filed a motion for rehearing raising the *Ring* issue on October 31, 2003. The Florida Supreme Court denied the motion without comment on November 25, 2003. The mandate issued on December 29, 2003. The petition for writ of certiorari was filed on February 20, 2004. The petition was timely. *See* Sup. Ct. R. 13.1; 28 U.S.C. § 2101(c). Jurisdiction exists pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

> impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment of the United States Constitution, section one, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

The facts, as set forth in the Florida Supreme Court's opinion, are as follows:

> John D. Freeman (Freeman) was convicted of first-degree felony murder for the 1986 killing of Leonard Collier (Collier). Freeman was sentenced to death, and both the conviction and sentence were affirmed on appeal. *See Freeman v. State*, 563 So. 2d 73 (Fla. 1990). Collier caught Freeman in the act of burglarizing his home. Freeman claimed that Collier pointed a gun at him and threatened to shoot him to prevent his escape. The two struggled over the gun and fell outside into the front yard. When Freeman obtained possession of the gun, he used the gun to repeatedly strike Collier in the head ten to twelve times. Collier died from the head wounds.
>
> The Collier murder was the second murder that Freeman committed within twenty-two days. The first murder was committed in a similar manner--the victim, Alvin Epps (Epps), came home to find Freeman burglarizing his home and Freeman stabbed him to death. In the Epps case, Freeman was convicted of first-degree murder, the jury recommended a life sentence, the judge overrode the jury recommendation, and this Court reversed the override. *Freeman v. State*, 547 So. 2d 125 (Fla. 1989).

Freeman v. State, 858 So. 2d at 321-322.

In his brief to the Florida Supreme Court, in the post-conviction appeal of his 3.850 motion following a remand, Freeman

raised five issues: (1) did the prosecutor's refusal to plea bargain in a case where the defendant was white and the victims were African-American violate equal protection; (2) whether defense counsel was ineffective for failing to file a motion to preclude the death penalty based on the reverse *McCleskey* claim; (3) was trial counsel ineffective at penalty phase for failing to present additional mitigating evidence; (4) was trial counsel ineffective for failing to provide the mental health expert with records; and (5) was trial counsel ineffective for failing to subpoena a mitigating witness. The Florida Supreme Court addressed these claims in its opinion. *Freeman v. State*, 852 So.2d 216 (Fla. 2003). No issue regarding *Ring v. Arizona*, 536 U.S. 584 (2002) was raised by petitioner at this stage or addressed by the Florida Supreme Court. Freeman's new counsel filed a motion for rehearing on October 31, 2003, which raised, for the first time, a claim that Freeman's death sentence violated *Ring*. The State, in its response to the motion for rehearing, pointed out that this was a new issue that had not previously been raised in briefs and therefore, was not properly raised in the motion under Florida law. Alternatively, the State argued that *Ring* was not retroactive. The Florida Supreme Court denied the motion for rehearing without addressing the *Ring* issue.

ARGUMENT

WHETHER CERTIORARI SHOULD BE GRANTED TO REVIEW A CLAIM ONLY PRESENTED TO THE STATE COURT IN A MOTION FOR REHEARING?

Petitioner's *Ring* claim was not properly presented in state court. Freeman did not assert that his death sentence violated the Sixth Amendment until his motion for rehearing. As this Court has stated:

> With "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. *See Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-219 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).
>
> * * * *
>
> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), and the aggrieved party bears the burden of defeating this assumption, *ibid.*, by demonstrating that the state court had a "fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Adams v. Robertson, 520 U.S. 83, 86-87 (1997)(holding certiorari was improvidently granted because the federal constitutional issue was never presented to state Supreme Court). Here, Petitioner seeks review of an opinion which makes no mention of his claim that Florida's capital punishment statute violates *Ring*. This is so because Petitioner did not raise this issue before the Florida Supreme Court until he filed his motion for rehearing. This Court has held that the failure to raise a constitutional claim until a motion for rehearing is insufficient to carry a petitioner's burden of showing that the issue was properly presented. *Adams*, 520 U.S. at 89 n.3 (refusing to consider federal constitutional issue raised for the first time in a petition for rehearing before the Alabama Supreme Court when the state supreme court was silent on the question); *Rotary Club of Duarte*, 481 U.S. at 550 (observing that when a court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation where the party did not present the issues squarely to the court until they filed their petition for rehearing which was denied without opinion). This assumption should apply with equal force here. Pursuant to Florida Rule of Appellate Procedure governing motions for rehearing, rule 9.330(a), "[a] motion for rehearing shall state with particularity the points of law or fact that in the opinion of the movant the court had overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding." (emphasis added). Under these circumstances, it cannot fairly be said that the Florida Supreme Court ignored its own rules of procedure and considered this claim on the merits *sub silentio*. As such, this Court should not grant certiorari on this issue.

Nor does the summary denial of the motion for rehearing conflict with the decision of any other state court of last resort or any decision of any federal court of appeals. The rule addressing considerations governing review on certiorari provides that this Court will consider exercising its certiorari jurisdiction when a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last

resort or of a United States court of appeals. Sup. Ct. R. 10(b). Of course, a summary denial of a motion for rehearing based on a state appellate procedural rule cannot conflict with any other decision of any other state or federal circuit court.

Moreover, respondent maintains that *Ring* should not be applied retroactively under the test set forth in *Teague v. Lane*, 489 U.S. 288 (1989). Nevertheless, even if Petitioner could show that this issue had been properly presented and decided by the Florida Supreme Court, and *Ring* is held to be retroactive by this Court,[1] Freeman is still not entitled to relief. Freeman was death eligible upon conviction. Freeman had previously been convicted of the crimes of first-degree murder, armed robbery, and burglary to a dwelling with an assault. *See Freeman v. State*, 563 So.2d 73, 75 (Fla. 1990).

Freeman argues that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) does not allow a judge to find a prior conviction exists when that finding is used as an aggravator in a capital case. Petitioner did not present this particular claim even in his motion for rehearing. In his motion for rehearing, Freeman acknowledged that the judge was allowed to find the prior violent felony aggravator. No such argument was presented to the Florida Supreme Court at any time.

Almendarez-Torres is still valid law in the wake of *Apprendi* and *Ring*. In *Apprendi*, this Court exempted "the fact of a prior conviction" from its requirement of a jury finding of any fact that increases the penalty beyond the statutory maximum. *Apprendi*, 530 U.S. at 490. Although this Court extended *Apprendi* to capital cases in *Ring*, *Ring* did not involve the prior violent

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[1] The issue of the retroactivity of *Ring* is currently pending in this Court. *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), *cert. granted, sub. nom. Schriro v. Summerlin*, 124 S. Ct. 833 (Dec. 1, 2003)(No. 03-526); But see *Turner v. Crosby*, 339 F.3d 1247, 1279-1286 (11th Cir. 2003)(concluding that *Ring* was a new procedural rule that did not meet either of the two exceptions in *Teague v. Lane*, 489 U.S. 288 (1989)).

felony aggravating circumstance, and therefore, this Court did not address the *Almendarez-Torres* exception. *Ring*, 536 U.S. at 597 n. 4. *Almendarez-Torres* is still valid law and no court has held otherwise. Petitioner's dissatisfaction with the holding in *Almendarez-Torres* does not compel certiorari review; this Court continues to acknowledge *Almendarez-Torres* and its long-standing principle that recidivism has long been recognized as a legitimate basis for increased punishment. *See Ewing v. California*, 538 U.S. 11, 25 (2003); *Harris v. United States*, 536 U.S. 545, 553 (2002). Given this Court's reluctance to overrule existing precedent absent special justification, *see Harris*, 536 U.S. at 557, and the lack of any such justification in the certiorari petition, review of this issue must be denied.

Exempting recidivism from the holding in *Apprendi* is logical. A defendant is entitled to one jury trial, not two. Frank R. Herrmann, *30=20: "Understanding" Maximum Sentence Enhancements*, 46 BUFF. L. REV. 175 (1998)(explaining that recidivism should be exempt from the elements rule because the defendant has already received a full trial and due process for the prior conviction and observing that the prior conviction received "the totality of constitutional protections" which distinguishes the use of prior convictions from other sentence enhancers and concluding that requiring full trial rights for the prior conviction would be "redundant".) Any defendant, who is a recidivist, has already had a jury find the underlying facts of the prior conviction at the highest standard of proof. The judge, in a recidivist situation, is merely taking judicial notice of a prior jury's verdict.

Furthermore, the vast majority of criminal defendants plead. These defendants waived the right to a jury trial. If *Almendarez-Torres* is overruled, a defendant will have resurrected his right to a jury trial, that he waived when he pled, by the act of committing a second offense Overruling *Almendarez-Torres* would create the odd result of unwaiver by criminal conduct. Moreover, the prosecution often agrees to a plea to avoid the time and trouble of a trial. For the prosecution to have to prove a crime

years after it was committed, with all the attendant problems of lost evidence, missing witnesses and foggy memories, because the defendant committed another crime, seems to be a breach of the original plea agreement.

Petitioner also asserts, for the first time in this Court, that the weighing of aggravating circumstances versus mitigating circumstances must be performed by the jury, not the judge. Freeman presented no such claim in state court. In his motion for rehearing, Freeman implicitly acknowledged that weighing could be performed by the judge.

A judge, sitting without a jury, may perform the weighing. Weighing is not a fact; rather, it is a judgment.[2] As Justice Scalia noted in *Ring*, the judge may be the ultimate sentencer in a capital case. *Ring*, 122 S.Ct. at 2445 (Scalia, J., concurring)(stating that "today's judgment has nothing to do with jury sentencing" and "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so . . ."). A judge may perform the weighing.

This Court should not grant review of a claim not properly presented to the state Supreme Court, parts of which are presented for the first time in this Court. Nor should this Court grant review of a summary denial of a motion for rehearing that does not conflict with any other case. While the issue of the retroactivity of *Ring* is

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[2] *Oken v. State*, 835 A.2d 1105, 1121-1122 (Md. 2003)(rejecting a claim that *Ring* requires the jury to do the weighing and explaining that a judge may, without a jury, conduct the weighing process because it "is purely a judgmental one," of balancing the mitigators against the aggravators to determine whether death is the appropriate punishment and this process is "not only traditionally, but quintessentially is a pure and Constitutionally legitimate sentencing factor" and concluding that *Ring* does not pertain to the selection phase); *Ex parte Waldrop*, 859 So. 2d 1181, 1188-1189 (Ala. 2002)(rejecting a claim that *Ring* requires the jury to do the weighing, reasoning that the weighing process is not a factual determination and is not susceptible to any quantum of proof; rather, the weighing process is a moral or legal judgment that takes into account a theoretically limitless set of facts).

obviously worthy of certiorari review, this particular case is not because the Florida Supreme Court never addressed the retroactivity of *Ring* in its denial of the motion for rehearing and *Ring* did not change Florida sentencing law. Review is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Case No. 03-1196

IN THE SUPREME COURT OF THE UNITED STATES

JOHN D. FREEMAN,

Petitioner,

v.

JAMES V. CROSBY, JR.,

Respondent.

On Petition for Writ of Certiorari To
The Supreme Court of the State of Florida

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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"CAPITAL CASE"

QUESTION PRESENTED FOR REVIEW

[Capital Case]

[Restated]

Should this Court hear Mr. Freeman's claims involving *Ring v. Arizona*, 536 U.S. 584 (2002), on certiorari review?

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28 U.S.C. § 1257 (a):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States 2

Fla. R. App. Proc. 9.330 (a):

"[a] motion for rehearing shall state with particularity the points of law or fact that in the opinion of the movant the court had overlooked or misapprehended in its decision, and shall not present the issues not previously raised in the proceeding." 6

Sup. Ct. R. 24.1 (a):

The question presented for review under Rule 14.1 (a). The questions shall be set out on the first page following the cover, and no other information may appear on that page. The phrasing of the question presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may mot raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide 10

CONSTITUTIONAL PROVISIONS

Article III § 2 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--...

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment, Section 1 of the United States Constitution Provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked under Article III § 2 of the Constitution of the United States and 28 U.S.C. § 1257 (a). This brief on the merits is brought pursuant to Supreme Court of the United States Rule 24.

STATEMENT OF THE CASE

Mr. Freeman was convicted of first degree murder in the Circuit Court for the Fourth Judicial Circuit, in and for Duval County, State of Florida and sentenced to death. The Florida Supreme Court affirmed the conviction and

sentence on direct appeal.[1] The United States Supreme Court denied certiorari review in 1991.[2] Mr. Freeman filed a motion for post conviction relief in state circuit court pursuant to Fla. R. App. Proc. 3.850. That motion was denied. Mr. Freeman appealed the denial of that motion to the Florida Supreme Court and filed a brief in support thereof on April 11, 2002. This Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), on June 24, 2002. Mr. Freeman's post-conviction appeal was denied on July 11, 2003.[3] Mr. Freeman filed a timely Motion for a Rehearing in the Florida Supreme Court and raised additional claims citing the *Ring* decision.[4] The State filed a Response[5] to the Motion for a Rehearing in which it addressed the merits of the *Ring* arguments. Mr. Freeman then filed a motion in the Florida Supreme Court, requesting that he be allowed to file a reply brief to the State's Response, or in the alternative to permit oral arguments.[6] The Florida Supreme Court denied Mr. Freeman's motion for a rehearing without opinion.[7]

ARGUMENT

This Court should review Mr. Freeman's *Ring* based claims because policy considerations for abstention are not applicable in this case and fundamental error occurred at his trial proceeding.

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[1] *Freeman v. State*, 536 So. 2d 73 (Fla. 1990).
[2] *Freeman v. Florida*, 501 U.S. 1259 (1991) (Cert. denied).
[3] *Freeman v. State*, 858 So. 2d 319 (Fla. 2003).
[4] See, *Appendix 1.*
[5] See, *Appendix 2.*
[6] See, *Appendix 3.*
[7] *Freeman v. State*, 2003 Fla. Lexis 2078 (Fla. 2003).

Generally, this Court will not grant certiorari review of issues that were not "pressed or passed upon" by the lower courts.[8] The Court, in *Illinois v. Gates*, 462 U.S. 213, 221-2 (1983), identified the several purposes underlying the "not pressed or passed upon" rule as: 1) the record is likely to be inadequate concerning questions not raised below because it was not compiled with those questions in mind, 2) due regard for the appropriate relationship of the Supreme Court to state courts demands that the state courts be given an opportunity to consider the constitutionality of the actions of state officials and proposed changes in existing remedies for unconstitutional actions, and 3) it gives the state courts an opportunity to rest their decision on independent and adequate state grounds. In this circumstance the policy considerations do not support denying review of Mr. Freeman's *Ring* based claims. Each policy consideration will be addressed in turn.

THE RECORD ON APPEAL:

The record in this case sufficiently addresses the claims involving *Ring* to permit review by this Court. The Court in *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) explained the preference for an adequate record, stating: "Prudence...dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question."

In this case Mr. Freeman presented the claims involving *Ring* to the Florida Supreme

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[8] *Illinois v. Gates*, 462 U.S. 213 (1983).

Court for the first time in a Motion for Rehearing.[9] The state of Florida filed a Response to the Motion for Rehearing in which it thoroughly addressed the *Ring* claims raised by Mr. Freeman. [10] Mr. Freeman also filed a motion in the Florida Supreme Court requesting that he be allowed to file a reply to the State's Response, or in the alternative to permit oral arguments on the Motion for Rehearing.[11] The Motion for Rehearing was summarily denied by the Florida Supreme Court.[12]

The record on appeal in this case is only incomplete with regard to opinions by the state trial court and high court addressing the merits of Mr. Freeman's federal claims. However, given the express refusal of the Florida judiciary to apply the *Ring* opinion to any case, the lack of an opinion by the Florida courts should not bar federal review in this case.

OPPORTUNITY FOR STATE TO ADDRESS FEDERAL QUESTION AND PROVIDE APPROPRIATE RELIEF:

The objective of this Court's policy to promote federalism by avoiding review of a federal question until a state has had an opportunity to address the claim and provide appropriate relief is not forwarded by denying review in this

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[9] See, *Appendix 1* (wherein Mr. Freeman requested reconsideration of Florida Supreme Court's denial of Mr. Freeman's Motion for Post-Conviction relief in light of this Court's then recently released opinion in *Ring*).

[10] See, *Appendix 2*.

[11] See Appendix 3, *Motion to File Reply or in the Alternative Request an Oral Argument to State of Florida's Response to Defendant's Motion for Rehearing.*

[12] *Freeman v. State*, 2003 Fla. Lexis 2078 (2003).

circumstance. The State argues in its Response that since Florida Rule of Appellate Procedure 9.330 (a)[13] does not permit new issues to be raised for the first time in a motion for rehearing, this Court must presume that the state decision rested on independent and adequate state grounds and therefore cannot address the *Ring* claims.[14]

In this case Mr. Freeman was unable to raise the *Ring* claims at his trial or on direct appeal because *Ring* had not yet been decided. Mr. Freeman presented his federal claims involving *Ring* to the Florida courts at the first available opportunity.

Mr. Freeman filed his brief on appeal from the state trial court's denial of his Motion for Post-conviction Relief in the Florida Supreme Court on April 11, 2002. Subsequently, *Ring v. Arizona*, 536 U.S. 584 (2002) was decided on June 24, 2002. The Motion for a Rehearing was the first opportunity for Mr. Freeman to bring the claims before a state court. Mr. Freeman should not be punished for failing to raise these issues in his trial when it was not cognizable to do so at that time. The United States Supreme Court addressed a similar situation in *O'Connor v. Ohio*, 385 U.S. 92 (1966).

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[13] "[a] motion for rehearing shall state with particularity the points of law or fact that in the opinion of the movant the court had overlooked or misapprehended in its decision, and shall not present the issues not previously raised in the proceeding." *Fla. R. App. Proc. 9.330 (a).*

[14] See, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (stating that when "the highest state court has failed to pass upon the federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.")

In *O'Connor*, a defendant (O'Connor) was tried in a state court for larceny. During the trial the prosecutor commented on the fact that O'Connor declined to testify on his own behalf. O'Connor did not object to the comments at the trial or raise the issue in his first appeal. O'Connor was convicted.

After his trial but before his conviction became final the United States Supreme Court decided *Griffin v. California*, 380 U.S. 609 (1965) wherein the court held that it is a violation of the Fifth Amendment for a prosecutor to improperly comment on a defendant's refusal to testify. The United States Supreme Court heard O'Connor's case on certiorari and remanded the case to the state court for review in light of *Griffin*.

On remand the state court denied O'Connor relief under *Griffin*, claiming that he was procedurally barred from bringing the claim because he had failed to object to the comments at trial or on his first appeal. The Supreme Court again granted certiorari, this time on the question of whether the state court could procedurally bar review of O'Connor's claim because he did not raise the issues at trial or on appeal where the grounds for the claim were not cognizable at the time of his trial or appeal. The Court held that under the circumstances of O'Connor's case the failure to object in the state courts could not bar the petitioner from asserting the federal right.[15]

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[15] In this case the *Ring* decision was released after Mr. Freeman had exhausted his direct appeal. Even though Mr. Freeman's case is considered final for *Teague v. Lane*, 489 U.S. 288 (1989) purposes, that label is not dispositive to this Court's decision to grant certiorari because the issues raised by Mr. Freeman involve fundamental error in the trial process and are not subject to *Teague*. The issue of retroactive application of *Ring* to Mr. Freeman's case has been briefed by both parties before this Court. The issue of whether Ring applies retroactively

Further, it should not be presumed that the Florida Supreme Court failed to pass upon the *Ring* based claims in Mr. Freeman's case for lack of proper presentation because the Florida Supreme Court has repeatedly stated that it will not apply this Court's opinion in *Ring* to any Florida case absent specific direction to do so by this Court.[16] The Florida judiciary should not be allowed to insulate state laws from federal review by refusing to address federal claims.[17]

In addressing the objective of this Court's deferment to state procedural grounds in the interest of federalism Justices Blackmun, Marshall, and Stevens wrote:

> It is well settled that the existence of a state procedural default does not divest a federal court of jurisdiction on collateral review. Rather, the important office of the federal courts in vindicating federal rights gives way to the States' enforcement of their procedural rules to protect States'

(presumably in regard to Arizona law) is pending before this Court in *Schriro v. Summerlin*, 124 S. Ct. 833 (Dec. 1, 2003).

[16] See, *Bottoson v. Moore*, 824 So. 2d 127 (Fla. 2002); See, *Lawrence v. State*, 846 So. 2d 115 (Fla. 2003) (noting that relief would not be warranted under *Ring* , even if applicable, because defendant had a prior violent felony conviction); and See, *Rivera v. State*, 859 So. 2d 495, 508 (Fla. 2003) (noting that no relief would be afforded under *Ring*, even if applicable, because jury verdict was unanimous).

[17] Even though these constitutional claims might be reviewed by a federal court in a habeas action, to continue to hold Mr. Freeman under a sentence of death absent a constitutional jury trial violates Mr. Freeman's right to Due Process under the Fifth and Fourteenth Amendments and the right to a jury trial under the Sixth and Fourteenth Amendments.

interest in being an equal partner in safeguarding federal rights.[18]

Under theses circumstances it is apparent that where the Florida state courts are reticent regarding important Constitutional rights violations inherent in the state's death penalty statute it is the role of this Court to protect those rights.

Mr. Freeman contends that the state courts were given fair and adequate opportunity to address the *Ring* issues but failed to do so, as they have in every other circumstance where a person has raised the claim. The Florida Supreme Court could have addressed this issue when it was presented in Mr. Freeman's Motion for a Rehearing and when Mr. Freeman requested oral arguments on the issues.[19] The Florida Supreme Court claims that it is unsure whether *Ring* applies to Florida's death penalty statute[20] yet it has never petitioned that a federal court address the issue.

INDEPENENT AND ADEQUATE STATE GROUNDS:

The rationale that a state should ordinarily be granted an opportunity to rest its decision on independent and adequate state grounds in the interest of federalism is not persuasive in this case. The lack of a jury trial on every element of the crime of which Mr. Freeman was charged

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[18] *Coleman v. Thomas*, 501 U.S. 722 (1991) (JJ. Blackmun, Marshall, and Stevens, dissenting).

[19] See, *D'oleo-Valdez v. State*, 531 So. 2d 1347 (Fla. 1988) (Error may be addressed for the first time on appeal where error is fundamental and amounts to a denial of due process)

[20] See, *Bottoson*, supra.

constituted fundamental error because it affected the very framework of the trial. There are no possible independent and adequate state grounds that would excuse this violation of Mr. Freeman's constitutional rights.

Where appropriate this Court has the power to notice plain or fundamental error appearing on the record, although no question in that respect was raised or properly raised by the parties.[21] This is such a case.

CONCLUSION

Mr. Freeman contends that the record before this court is sufficient to decide the issues presented in the petition for certiorari and that there is no other legitimate basis for denying review. Mr. Freeman prays that this court will grant certiorari review on these issues.

Mr. Freeman prays that in the alternative, should this court determine that the state should have an opportunity to review these claims, that this honorable Court remand this case to the Florida Supreme Court with direction to review the case in light of *Ring v. Arizona*.

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[21] See, *Vachon v. New Hampshire*, 414 U.S. 478 (1974); Also see, United States Supreme Court Rule 24 (a) stating, "At its option...the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."

APPENDIX 1

SUPREME COURT OF FLORIDA

CASE NO.: SC01-2007
Lower Tribunal No.: 86-11599-CFA

JOHN D. FREEMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

DEFENDANT'S MOTION FOR REHEARING

HERE COMES NOW, Defendant, JOHN D. FREEMAN (hereinafter Defendant), by and through his undersigned counsel, files this Motion for Rehearing on this Court's affirmance of the trial court's denial of Defendant's 3.850 Motion after an evidentiary hearing, and in support thereof states as follows:

1. Defendant was previously convicted of first-degree murder. (R. 145, 1564).

2. Defendant was subsequently sentenced to death after a jury vote of 9-3. (R. 257-259).

3. Defendant appealed his convictions and sentences, which were later affirmed on

direct appeal. *Freeman v. State*, 563 So. 2d 73 (Fla. 1990).

4. Defendant filed a 3.850 Motion for Post-conviction Relief in 1995, in the Fourth Judicial Circuit, and said Motion was denied.

5. Defendant appealed said denial to Florida Supreme Court, and this Court remanded the issue of ineffectiveness of counsel at the penalty phase and the issue of racial bias claim for an evidentiary hearing, and affirmed the rest of said denial. *Freeman v. State*, 761 So. 1055 (Fla. 2000).

6. The trial court denied the remanded issues of the 3.850 Motion after an evidentiary hearing on July 16th and 17th, 2001.

7. Defendant appealed the trial court's denial to the Florida Supreme Court, alleging the following issues: (1) Ineffective assistance of counsel at the guilt phase of trial for failing to object to the State's alleged improper reliance on racial factors in seeking the death penalty (2) Ineffective assistance at the penalty phase for failing to present evidence in mitigation.

8. On July 11, 2003, the Supreme Court of Florida affirmed the trial court's denial of Defendant's Motion for Post-conviction Relief under Fla. R. Crim. Pro. 3.850. *Freeman v. State*, 852 So. 2d 216 (Fla. 2003).

9. The undersigned counsel was appointed to represent Defendant in the remainder of Post-conviction proceedings on July 9th, 2003.

10. Defendant contends that the Florida Supreme Court should grant a rehearing and other requested relief for the following reasons.

ARGUMENT ONE:
INEFFECTIVE ASSISTANCE OF COUNSEL

1. Defendant reestablishes the Ineffective assistance of counsel argument, and alleges that both Defendant's trial and appellate counsel were ineffective by failing to reasonably investigate statutory and nonstatutory mitigation, including failure to provide an expert to correlate Defendant's history of drug and alcohol abuse with any statutory mental mitigation.

2. Florida case law holds that long term use of drugs and alcohol is a nonstatutory mitigating factor. *Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001); *Robinson v. State*, 761 So. 2d 269 (Fla. 1999); *Foster v. State*, 654 So. 2d 114 (Fla. 1995).

3. Florida case law further holds that long term alcohol and drug abuse is relevant and supportive of the mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control his behavior. *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990); *Ross v. State*, 474 So. 2d 1170 (Fla. 1985).

4. In Defendant's guilt and penalty phase, Defendant's counsel did not adequately investigate, nor did the trial court consider his long term drug and alcohol abuse as either a statutory mitigating factor or a nonstatutory mitigating factor. *Freeman v. State*, 852 So. 2d 216 (Fla. 2003).

5. Further, no evidence of Defendant's previous drug and alcohol abuse was presented by Defendant's counsel in the guilt and penalty phase by either direct evidence or testimony of an expert.

6. Defendant's previous counsel admits, "he knew of Defendant's use of drugs and alcohol, but did not use that information because he could not link it to the crime, and that he should have "delved" more deeply into Defendant's drug and alcohol abuse." *Id.* The trial counsel further states, "I did not put on mitigation regarding Defendant's abuse of drugs and alcohol because, it would not do me any good in the penalty phase." (EMT p. 371).

7. Further in support of the ineffective assistance of counsel claim, during the evidentiary hearing on remand from the Florida Supreme Court, Defendant's appellate counsel demonstrated to the trial court through witness and expert testimony that Defendant's trial counsel was ineffective in finding the following mitigating circumstances of Defendant's life: (1) He had been abusing drugs and alcohol, including heavy doses of cocaine and marijuana since 1981, and up until he was arrested for his first murder conviction Defendant was "as strung out as they come." (EMT p. 510-511); (2) Severe physical abuse by his stepfather, Charles Freeman, that was just short of killing Defendant. (EMT p. 186, 265); (3) Was shown no love by his stepfather, and Defendant's mother did nothing to protect him from the abuse of his stepfather. (EMT p. 188); (4) Defendant suffered from organic mental disorder which is associated with impulsivity, making his capacity to conform his conduct to the requirements of the law substantially impaired. (EMT p. 125, 135); (5) Defendant's academic skills range from a third to seventh grade level. (EMT p. 125); (6) Defendant was prescribed medication while awaiting murder trial in Duval County, and was depressed and

suicidal during this time. (EMT p. 133); (7) Defendant has had low academic achievement. (EMT p. 331); (8) Defendant had trouble processing information, and tended to avoid conflict. (EMT p. 332); (9) School records indicated early and continuing academic problems, as well as social problems. (EMT p. 343); (10) Defendant does not see as many possible solutions to problems as others do. (EMT p. 132); (11) As a result of mental organic brain damage, Defendant is quite impulsive, making decisions on the spur of the moment without thinking about the consequences, and acts on the emotion of the moment. (EMT p. 132).

8. These aforementioned facts and circumstances of Defendant's history, as well as his mental and physical characteristics, have all been held by Florida Courts to be either statutory or nonstatutory mitigation. *Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001); *Doorbal v. State* 837 So. 2d 940 (Fla. 2003); *Hess v. State*, 794 So. 2d 1249 (Fla. 2001); *Foster v. State*, 654 So. 2d 114 (Fla. 1995); *Robinson v. State*, 761 So. 2d 269 (Fla. 1999).

9. Moreover, from the uncontroverted evidence of all previous proceedings, if presented by Defendant's trial or appellate counsel, the following mitigation could also have been used by the trial court in its determination as to whether death is the appropriate penalty: (1) Lack of a male role model when growing up; (2) Suffered from some mental or emotional disturbance when the murder was committed; (3) Poverty; (4) Troubled personal life; (5) Physical injuries; (6) Learning disabilities; (7) Had people who loved him; (8) Ability to adjust to prison life. *Hess v. State*, 794 So. 2d 1249 (Fla. 2001); *Foster v.*

State, 654 So. 2d 114 (Fla. 1995); Robinson v. State, 761 So. 2d 269 (Fla. 1999).

10. Moreover, Defendant's trial counsel, as well as previous appellate counsel, failed to have an expert perform an examination and introduce evidence that he suffered from either/or of the said statutory mental mitigators as the result of Defendant's chronic drug and alcohol abuse, despite the fact that Defendant had consistently been using drugs since approximately age eleven.

11. The trial court, in its Second Order Denying Defendant's First Motion for Post-conviction Relief, acknowledged Defendant's appellate counsel mistakes by stating that, "this Court will also note that the Defendant did not present at the evidentiary hearing from an expert qualified to testify regarding the effects of Defendant's alcohol and drug abuse. This Court finds that Defendant failed to prove that counsel's performance was deficient for this reason as well." (Court's Order affirming denial of 3.850, p. 7).

12. The uncontroverted proof from witness testimony shows that Defendant was a serious substance abuser, and without an accurate assessment by an expert regarding the Defendant's prior substance abuse in relation to possible statutory mitigation, Defendant will have been severely prejudiced. See Gaskin v. State, 822 So. 2d 1243 (Fla. 2002), [*holding the mitigators of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control behavior are of the weightiest order, and the failure to present them in the penalty phase may constitute prejudicial ineffectiveness*].

13. Both Defendant's trial counsel and previous appellate counsel were ineffective in

failing to present an expert witness who was qualified to give an opinion as to the correlation between the Defendant's mental mitigation and his substance abuse. In support thereof, this Court has stated that, "with Freeman's substantial history of drug and alcohol abuse, defense counsel may have been ineffective for failing to present an expert witness who was qualified to give an opinion on this issue... There is a reasonable doubt as to the effect such a witness might have had on the jury's recommendation." *Freeman v. State*, 761 So. 2d 1055 (Fla. 2000).

14. It follows that most of the Defendant's history and characteristics were never brought out by previous counsel as both statutory and nonstatutory mitigation. In fact, the only mitigation presented by Defendant's trial counsel was low I.Q., he was artistic, liked playing with kids, and had been abused by his stepfather.

15. Had Defendant's previous counsel in both the trial and appellate levels done further research and investigation on what constitutes statutory and nonstatutory mitigation, an expert would have been assigned to evaluate the correlation between Defendant's substance abuse and the two statutory mitigators of extreme emotional or mental disturbance and capacity to conform one's conduct to the requirements of the law.

16. In summary, the following voluminous, virtually uncontroverted nonstatutory mitigation could have been presented at Defendant's penalty phase to further strengthen mitigation: (1) Lack of a male role model when growing up; (2) Suffered from some

mental or emotional disturbance when the murder was committed; (3) Poverty; (4) Troubled personal life; (5) Physical injuries; (6) Learning disabilities; (6) Had people who loved him; (7) Ability to adjust to prison life; (8) Defendant had been abusing drugs and alcohol, including heavy doses of cocaine and marijuana since 1981, and up until he was arrested for his first murder conviction Defendant was "as strung out as they come." (EMT p. 510-511); (9) Severe physical abuse by his stepfather, Charles Freeman, that was just short of killing Defendant. (EMT p. 186, 265); (10) Defendant was shown no love by his stepfather, and Defendant's mother did nothing to protect him from the abuse of his stepfather. (EMT p. 188); (11) Suffered from organic mental disorder which is associated with impulsivity, which made his capacity to conform his conduct to the requirements of the law substantially impaired. (EMT p. 125, 135); (12) Defendant's academic skills, which range from a third to seventh grade level. (EMT p. 125); (13) Defendant was prescribed medication while awaiting murder trial in Duval County, and was depressed and suicidal during this time. (EMT p. 133); (14) Defendant has had low academic achievement. (EMT p. 331); (15) Defendant had trouble processing information, and tended to avoid conflict. (EMT p. 332); (16) School records indicated early and continuing academic problems, as well as social problems. (EMT p. 343); (17) Defendant does not see as many possible solutions to problems as others do. (EMT p. 132) and (18) As a result of mental organic brain damage, Defendant is quite impulsive, making decisions on the spur of the moment

without thinking about the consequences, and acts on the emotion of the moment. (EMT p. 132).

17. With the possibility of the two statutory mental mitigators, together with the aforementioned voluminous nonstatutory mitigators, if presented at the penalty phase at Defendant's trial, would have had a reasonable probability of yielding a verdict of life imprisonment. Rose v. State, 675 So. 2d 572 (Fla. 1996).

ARGUMENT TWO:
DEFENDANT'S SENTENCE IS DISPROPORTIONATE

1. Coupled with the aforementioned unfound mitigation, Defendant's sentence is disproportionate, because Defendant's sentence is not the most aggravated and the least mitigated of first-degree murders. State v. Dixon, 283 So. 2d 7 (Fla. 1973) *See also;* Livingston v. State, 565 So. 2d 1288 (Fla. 1988), [*wherein the trial court found three aggravating factors - prior violent felony, murder committed during a robbery, and murder committed to avoid arrest. The Court balanced those factors against two mitigating circumstances - the Defendant's age (seventeen) and the Defendant's unfortunate upbringing and rearing - and found death was warranted. On appeal, this Court vacated the death sentence, struck the avoid arrest aggravator, and found on the record the following mitigators that effectively outweighed the remaining two aggravators: (1) Abused as a child (2) Mother neglected him (3) Defendant's age, inexperience, and immaturity (4) Marginal intellectual functioning and (5) Substance abuse of cocaine and marijuana.*] *Also see:* Kramer v. State, 619 So. 2d 274 (Fla. 1993) [*wherein the trial court*

found two aggravating factors - prior violent felony and the murder was especially heinous, atrocious, or cruel (HAC), and on appeal from a sentence of death, this Court vacated the sentence due to the following mitigating evidence: (1) The Defendant was under the influence of mental or emotional stress at the time the crime was committed (2) The Defendant's capacity to conform his conduct to the requirements of the law was severely impaired at the time of the crime (3) Defendant was a model prisoner (4) Defendant suffered from alcoholism and prior drug use.]

2. Further in support of the argument that Defendant's sentence is disproportionate is the case of *Johnson v. State*. In Johnson, the trial judge found three statutory aggravators: (1) Defendant had prior violent felonies; (2) The murder was committed while Defendant was engaged in the commission of a burglary; (3) The murder was committed for pecuniary gain. The judge found the statutory mitigators of age (Defendant was twenty-two at time of the crime), and the following nonstatutory mitigation: (1) Defendant surrendered to the police; (2) Defendant had a troubled childhood; (3) Defendant was previously employed; (4) Defendant was a good son and neighbor; (5) Defendant has a young child; (6) Defendant earned a high school graduate equivalency degree and participated in high school athletics. After the trial judge imposed the death sentence, this Court vacated Defendant's death sentence, finding that Defendant's sentence was disproportionate in light of the prior violent felony aggravator and the burglary/pecuniary gain aggravator balanced against the aforementioned statutory and

nonstatutory mitigation. 720 So. 2d 232 (Fla. 1998).

3. The Defendant's facts and circumstances in the instant case closely resemble *Johnson*, where, as stated, this Court found the Defendant's death sentence disproportionate.

4. Defendant contends that with another evidentiary hearing, Defendant's undersigned counsel would have an expert testify to statutory mental mitigation correlated with long term substance abuse of drugs and alcohol, as well as show the trial court the overwhelming nonstatutory mitigation that Defendant's previous trial and appellate counsel failed to investigate and/or bring forth as mitigation.

5. Had the proposed factual and expert testimony evidence been presented at the penalty phase of Defendant's trial, there is a reasonable probability that, but for Defendant's trial counsel's ineffectiveness, the balance of aggravating and mitigating circumstances would have been different and yielded a sentence of life. Defendant's trial counsels' lack of reasonable investigation and research prejudiced and deprived Defendant of a reliable penalty phase proceeding. *Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001); *See Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995), [*finding if said nonstatutory evidence was presented during the penalty phase, there is a reasonable probability that the Defendant would have been sentenced to life.*] *Rose v. State*, 675 So. 2d 572 (Fla. 1996).

6. In light of the lack of meaningful investigation and research by Defendant's previous counsel regarding the abundance of potential mitigating evidence, both statutory and

nonstatutory, this Court should grant this Motion for Rehearing and remand Defendant's case to the trial court for an evidentiary hearing so the undersigned counsel can present said mitigation evidence.

ARGUMENT THREE:
TRIAL COURT DID NOT CONSIDER AND WEIGH ALL MITIGATING EVIDENCE CONTAINED IN THE RECORD

1. Defendant contends that the trial judge did not consider and weigh all the mitigating evidence contained in the record in accordance with *Farr v. State*, 621 So. 2d 1368 (Fla. 1993).

2. In *Farr*, the trial court ignored the mitigating evidence on record and chose to focus on the heinousness of the crime and Defendant's past criminal record to find the Defendant deserving of the death penalty. On appeal, this Court ruled that the trial court was required to consider "any evidence of mitigation on the record," including Defendant's psychiatric and presentence reports, and because the trial court failed to do so, the death sentence was vacated. *Id*. *See also:* *Robinson v. State*, 684 So. 2d 175 (Fla. 1996). [*This Court vacated the death sentence and remanded to the trial court because the lower court failed to consider and weigh all of the available mitigating evidence in the record such as appellant's mental functioning and history of alcohol and/or drug abuse.]*; *Santos v. State*, 591 So. 2d 160 (Fla. 1991).*["It is well settled that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted."]*

3. In the instant case, in violation of *Farr* and the other aforementioned cases, the trial

court failed to consider and weigh all of the available mitigating evidence contained in the record. For example, nowhere in the judge's sentencing order does it mention the fact that Defendant's counsel presented said two statutory mitigators, including the statutory mitigation of Defendant's age, even though the jury was instructed by the trial judge on the possibility of these two mitigators. ["*Among the mitigating circumstances you may consider if established by the evidence are: One, the victim was a participant in the Defendant's conduct or consented to the act, and two, the age of the Defendant at the time of the crime.*"]

4. The following cases show that the trial judge should have found the statutory age mitigator applied to the Defendant, for instance, this Court has stated the following: ["*The age* ***mitigator*** *allows the judge and jury to consider the effect that the inexperience of the defendant on the one hand or, in conjunction with the no significant criminal history* ***mitigator,*** *the length of time that the defendant has obeyed the laws in determining whether or not one explosion of criminality warrants the extinction of life.*"][*Further, for a court to give a non-minor defendant's age significant weight as a mitigating circumstance, the defendant's age must be linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems. Age is a mitigating circumstance where a defendant's long history of substance abuse, mental and emotional instability, and passivity in the face of mental and physical abuse provides the essential link between the defendant's age and immaturity.*"]["*Moreover, where there is no per-se rule which pinpoints age as statutory mitigation,*

Defendant's ages of twenty-one and twenty-three have been ruled to be statutory mitigation."] Blackwood v. State, 777 So. 2d 399 (Fla. 2000).; Hurst v. State, 819 So. 2d 689 (Fla. 2002); Huddleston v. State, 475 So. 2d 204 (Fla.); Cannady v. State, 427 So.2d 723 (Fla. 1983).

5. The uncontroverted evidence given explained by both Dr. Legum and Dr. Larson show that Defendant suffered from (1) Physical and emotional abuse by the hands of his stepfather; (2) Poor social skills (tended to avoid conflict); (3) Had academic skills in the range of a third to seventh grader; (4) Substance abuse from both hard drugs and alcohol; (5) Depression while awaiting pretrial; (6) Suicidal tendencies while awaiting murder trial; (7) Poor school performance; (8) Organic brain damage and; (9) Low I.Q.

6. Defendant's aforementioned facts show that he suffered from substance abuse, mental and emotional instability, and mental and physical abuse, all of which are precisely the factors that the Court in *Hurst* used to explain how a non-minor Defendant can have the statutory mitigator of age. 819 So. 2d 689 (Fla. 2002)

7. These facts and circumstances of Defendant conclusively prove that age should have been considered and evaluated in the trial court's sentencing order and/or included in the trial court's weighing process as a statutory mitigator under the principle ruling of *Hurst v. State*.

8. Further, nowhere in the judge's sentencing order does it contain the following valuable evidence that has been found by Florida case law to constitute nonstatutory mitigation,

which was apparent from the record and further argued in Defendant's counsel's closing argument of his penalty phase: (1) Lack of a male role model when growing up; (2) Poverty; (3) Troubled personal life; (4) Immaturity; (5) Had people who loved him; (6) Defendant's academic skills range from a third to seventh grade level; (7) Emotional and mental disturbance.

9. Because "it is well settled that all mitigating evidence must be considered and weighed when contained anywhere in the record," and this necessary procedure was not abided by the trial judge as evinced by the previous paragraph, this Court should vacate Defendant's sentence with an order to the trial court to conduct a new penalty phase hearing in which all mitigating evidence is to be weighed against the aggravating circumstances of the crime before the trial court determines the proper penalty. Santos v. State, 591 So. 2d 160 (Fla. 1991); Farr v. State, 621 So. 2d 1368 (Fla. 1993). [*"It is clearly the responsibility of the trial court to affirmatively show that all possible mitigation has been considered and weighed, and it is error to fail to do so."*]; Robinson v. State, 761 So. 2d 269 (Fla. 1999). [*Defendant argued to no avail that the trial court failed to consider or give proper weight to the mitigating evidence, but this Court disagreed, because the trial judge "meticulously identified each mitigating circumstance presented by the defense and stated her conclusion as to each mitigator, supplying facts and reasoning for her conclusions."*]

ARGUMENT FOUR: DEFENDANT'S SENTENCE IS UNCONSTITUTIONAL UNDER RING V. ARIZONA

1. Defendant contends that his sentence is unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584 (2002); and *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003).

2. In Florida, the death penalty may only be imposed if the court sets forth in writing its findings upon which the sentence of death is based as to the following facts: (1) That sufficient aggravating circumstances exist; and (2) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances. *Fla. Stat. 921.141* (2003).

3. Further, in each case where the court imposes the death penalty, the court shall make specific written findings of fact based upon the aggravating and mitigating circumstances, and upon the records of the trial and sentencing proceedings. *Id.*

4. Lastly, if the court does not make the requisite finding to impose the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with *Fla. Stat. 775.082*.

5. Therefore, even though the trial judge gives the jury's recommendation great weight, it is the judge, not the jury, who makes the final determination whether to impose the death penalty, based on the judge's independent review and subsequent written findings that conclude the listed aggravating circumstances outweigh the

listed mitigating circumstances. (*Fla. Stat. 941.141.*)

6. It follows that the death penalty shall not be *imposed* in Florida unless the trial judge conducts an independent review of *all* the aggravating and mitigating circumstances and concludes that the aggravating circumstances *outweigh* the mitigating circumstances. Fla. Stat. 921.141 (2003). Usually a finding of one aggravating circumstance will not suffice, for if any substantial mitigation exists, a finding of death will almost always be disproportionate. Nibert v. State, 574 So. 2d 1059 (1990). [*"While this Court on occasion has affirmed a single-aggravator death sentence, it has done so only where there was little or nothing in mitigation."]*

7. In summary, the judge does not merely consider one aggravating circumstance before imposing the death penalty, but rather must consider all the aggravating factors and find that in totality, they outweigh the mitigators. This is an absolute requirement in Fla. Stat. 941.141.(2003).

8. However, the United States Supreme Court has ruled that a jury, not a sentencing judge, must find the aggravating circumstances necessary for the imposition of the death penalty. Ring v. Arizona, 536 U.S. 584 (2002).

9. Further, United States Supreme Court recently clarified the Ring decision stating, "we held (in Ring v. Arizona) that the Sixth Amendment requires that a jury, and not a judge, find the existence of *ANY* aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt." Sattazahn v. Pennsylvania, 537 U.S. 101 (2003).

10. Therefore, Florida's sentencing statute *Fla. Stat. 921.141* cannot pass constitutional muster under the Supreme Court decisions *Ring v. Arizona* and *Sattazahn v. Pennsylvania*, because in order for a Florida Defendant to be sentenced to death, a judge must first impose the death penalty only by making an individual determination that there is enough aggravating circumstances to outweigh the mitigating circumstances. Florida's death penalty statute reads: "*notwithstanding the recommendation of a majority of the jury... can impose a sentence of death if the judge sets forth in writing its findings that... sufficient aggravating circumstances exist... that outweigh the mitigating circumstances.*" Id., This is a finding that *Ring* and *Sattazahn* specifically holds to be a function solely of the jury.

11. For Florida's sentencing scheme to pass constitutional muster under *Ring v. Arizona*, the jury would first have to give the judge written findings as to any and all aggravating factors that have been found beyond a reasonable doubt. After said jury findings have been done, the judge may then constitutionally impose the death penalty using the listed aggravators given by the jury. This sentencing scheme would satisfy *Ring* and *Sattazahn* in their holdings that "a jury, and not a judge, must find the existence of *any* aggravating circumstance necessary for the imposition of the death penalty." *Id*.

12. *Fla. Stat. 941.141 (3)(a)* makes it clear that "imposition" of the death penalty is accomplished only when the sentencing judge, and not the jury, finds the existence of all aggravating circumstances necessary for the death penalty, a written finding of the

enumerated aggravating circumstances that *Ring* and *Sattazahn* holds to be made exclusively by a jury. *Id.*

ARGUMENT FIVE:
FLORIDA'S AGGRAVATING CIRCUMSTANCES ARE ELEMENTS OF THE OFFENSE ACCORDING TO SATTAZHAN V. PENNSYLVANIA

1. Florida's aggravating factors constitute an "element of an offense for purposes of the Sixth Amendment's jury-trial guarantee." *Id.* [*"Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a Defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt."*]

2. In Florida, for a Defendant to be sentenced to death, the Defendant first must be found guilty of 1st degree murder by a jury. Next, in the penalty phase, the same jury may render an advisory sentence of death, made by a determination that there are sufficient aggravating circumstances to outweigh mitigating circumstances. The jury does not have to make any written findings on which specific aggravating factors exist or which aggravating factors they had found. *Fla. Stat. 941.141 (2)(a)(b)(c)* (2002). Notwithstanding the jury's advisory sentence, the sentencing judge, in order to impose the death sentence, must place in writing findings that all the aggravating circumstances outweigh all the mitigating circumstances. *Id.* In short, there are two separate proceedings where the Defendant can be sentenced to two different sentences, to-wit: a binding jury sentence of life by finding the

Defendant guilty of 1st degree murder, and two; a judge's written sentence of death by finding that specific aggravating factors outweigh specific mitigating factors.

3. For example, Fla. Stat. 775.082 (1) (2003), shows the two possible sentences a defendant faces: [*"A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in S. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole."*]

4. However, as explained in *Sattazhan*, "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of murder plus one or more aggravating circumstances; whereas the former exposes a Defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death." *Id.*

5. *Sattazhan* explains that Florida Defendants face a maximum punishment of life imprisonment, unless the sentencing judge finds the existence of one or more aggravating circumstances and states in written findings that the aggravators outweigh the mitigating circumstances, and thereby imposes a death sentence.

6. Therefore, Florida's sentencing scheme is directly affected by *Ring* because there must be a finding by the trial judge ("notwithstanding the jury's advisory sentence, the judge, after weighing the aggravation and mitigation, decides life or death") of at least one aggravating circumstance to increase Defendant's

jury sentence from life to death. Ring v. Arizona, 536 U.S. 584 (2002).

7. As a result, Florida's aggravating circumstances constitutes an element of the offense for purposes of the Sixth Amendment, because the existence of that fact (the aggravating circumstance) increases the maximum punishment of life that may be imposed on a Defendant to death, and that fact, no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. 584 (2002); *Sattazahn v. Pennsylvania*, 537 So. 2d 101 (2003).

8. This Court has stated that the aforementioned argument is misplaced because it holds that case precedent has stated that aggravators are not elements of the offense and that a Defendant faces a maximum possible penalty of death. *Hildwin v. Florida*, 490 U.S. 638 (1989)[*"The existence of an aggravating factor here is not an element of the offense but instead is a sentencing factor that comes into play only after the Defendant has been found guilty."*]; Mills v. Moore, 786 So. 2d 532 [*"There can be no doubt that a person convicted of a capital felony faces the maximum penalty of death."*]

9. However, the unambiguous holding in *Sattazahn*, directly contradicts *Mills v. State*, whereby the Supreme Court of the United States held that "murder is a distinct, lesser included offense of murder plus one or more aggravating circumstances; whereas the former exposes a Defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death." *Id.* Also, in Apprendi v. New Jersey, the dispositive question

is "one not of form but of effect." 530 U.S. 466 (2000). The holding in *Sattazahn & Apprendi* applies directly to the Florida death penalty sentencing scheme, because, notwithstanding the jury's advisory sentence, in order for a Defendant to be sentenced to death, the sentencing judge must find the existence of one or more aggravating circumstances, weigh those aggravators against any mitigation, and then hold that the aggravating circumstances outweigh the mitigation to impose the death sentence. Also, if the judge finds that the mitigation outweighs the aggravation, the sentencing judge must impose life. *Fla. Stat. 941.141* (2002). Therefore, the only way a Defendant can be sentenced to death in Florida is if, without any help from a jury, a judge looks at every aggravating circumstance, every mitigating circumstance, and determines that aggravation outweighs mitigation. Without a judge's determination of one or more of the aggravating circumstances, the maximum sentence in Florida is life. In conclusion, the judge's finding of those facts (the aggravating circumstances) and weighing them against any mitigation, is the only way a Defendant's sentence can be increased from the jury's guilty verdict of 1st degree murder to death. *Ring v. Arizona*, 536 U.S. 584 (2002). It follows that *Sattazahn* and *Mills* are in direct conflict with one another, and therefore *Mills* should be receded from and Florida's maximum sentence should be life.

10. For the aforementioned reasons, *Hildwin v. State* is also in conflict with *Ring* and *Sattazahn*. After the jury renders a Defendant guilty of 1st degree murder, the death penalty may not be imposed in Florida without a judicial determination that sufficient aggravators

outweigh mitigators; a process whereby *Sattazahn* makes clear that murder is a "distinct, lesser included offense, whereby the death sentence is a separate, greater offense." *Id.*

11. Further, the Supreme Court's decision in *Apprendi* also held that "a Defendant may not be exposed... to a penalty exceeding the maximum he would have received if punished according to the facts reflected in the jury verdict alone." *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

12. Since *Ring* made *Apprendi* applicable to capital cases, it further appears that the Florida death penalty statute is unconstitutional, and *Hilden* should be receded. For example, the facts in a jury's verdict of guilty of 1st degree murder do not mention all the necessary aggravating circumstances needed to outweigh the mitigation and impose the death sentence. This finding of necessary aggravating factors are later found by a sentencing judge, who makes written findings of all the aggravating circumstances and mitigating circumstances and weighs the two circumstances to see if death is appropriate. Therefore, since "murder is a distinct, lesser included offense of murder plus one or more aggravating circumstances," it is the sentencing judge who thereby "exceeds" the jury's maximum verdict of life imprisonment, according to *Apprendi*, because the facts in the jury's verdict alone do not contain all the necessary aggravating circumstances used to weigh against the mitigating circumstances and impose the death sentence; This imposition of death can only be accomplished, according to Florida law, by the sentencing judge who must weigh, in writing, all of the aggravating and mitigating circumstances,

and make written findings as to why death is an appropriate sentence.

13. With the holding of *Apprendi* and *Sattazahn*, it is now apparent that the Florida death sentencing scheme comes under the umbrella and is directly affected by *Ring v. Arizona*, rendering the holdings in both *Hildwin* and *Mills* irreconcilable. In light of the aforementioned Supreme Court cases, Florida's aggravating circumstances should now be considered as elements of a capital offense, and it further should be held that the maximum punishment a Defendant faces in Florida is life imprisonment.

ARGUMENT SIX:
A JURY MUST FIND ALL AGGRAVATING CIRCUMSTANCES (OTHER THEN THE PRIOR VIOLENT FELONY CONVICTIONS BEYOND A REASONABLE DOUBT)

1. The existence of a prior violent felony aggravator does not render a judicial finding of all other aggravators harmless under *Ring v. Arizona.* As stated by Justice Anstead's dissent in *Duest v. State*, "the Sixth Amendment requirements announced in *Ring* and *Apprendi* do not allow a trial judge alone to find additional aggravating circumstances to be utilized in imposing the death penalty just because a prior violent felony aggravating circumstance need not be found by the jury." *Duest v. State*, 2003 Fla. LEXIS 1069 (Fla. 2003).

2. In support of the holding that aggravating circumstances other than a prior violent felony conviction can be found by a sentencing judge without a jury first finding said aggravators beyond a reasonable doubt, this

Court cites the *Almendarez-Torres* decision. In *Torres*, the United States Supreme Court held that a Defendant's prior conviction may be found by the judge even if it increases the statutory maximum sentence. 523 U.S. 597 (1998).

3. Further, the *Almendarez-Torres* decision, in its plain meaning, states that if the prior violent felony conviction is the sole aggravating circumstance, and it outweighs the mitigating circumstance(s), the sentencing judge is constitutionally allowed to impose a sentence of death.

4. It follows that the narrow holding of *Almendarez-Torres* allows a sentencing judge to increase the maximum penalty of a life sentence to a death sentence only if the sentence could possibility be increased by using the *sole prior violent felony aggravator*. In other words, if a Florida judge, by weighing this one aggravating circumstance, to-wit: the prior violent felony, against any mitigating circumstances, finds that this sole prior violent felony aggravating circumstance outweighs the mitigation, the death sentence will be found to be constitutionally imposed under *Ring* and *Apprendi*.

5. However, the *Almendarez-Torres* decision does not say what is to take effect if the sole prior violent felony aggravator is not enough for the sentencing judge to legally increase a life sentence to a death sentence by sufficiently finding that the aggravation outweighs the mitigation. That question is what the decisions of *Ring* and *Apprendi* answer, to-wit: "any other fact (other than the prior conviction aggravator found in the *Almendarez-Torres* decision) that increases the maximum punishment that may be imposed on a Defendant... constitutes an element, and

must be found by a jury beyond a reasonable doubt." 122 S. Ct. 2428 (2002).

6. The combined decisions of the Supreme Court cases of *Almendarez-Torres*, *Ring*, *Sattazahn*, and *Apprendi* state the following logical conclusion: If a prior violent felony aggravator is sufficient to outweigh the mitigating circumstances, a sentencing judge, by making written findings, can constitutionally increase the jury's verdict from a life sentence to the death penalty without the jury making a finding that this prior violent felony conviction exists beyond a reasonable doubt. If, however, the prior violent felony aggravator by itself would not outweigh the mitigating circumstances, the sentencing judge may not just use and weigh any other aggravating circumstances to impose the death penalty, but rather first must have the jury find the existence of any other aggravating circumstances beyond a reasonable doubt before the judge may use said aggravating circumstances to constitutionally increase the jury's life sentence and impose the death penalty.

7. Further, if a judge finds that there are other aggravating circumstances than the prior violent felony and uses these aggravating circumstances in the weighing process to impose the death sentence, without first having the jury find the existence of said aggravators beyond a reasonable doubt, the sentencing process is constitutionally flawed under *Ring*, *Sattazahn*, and *Apprendi*.

8. It follows that when a judge uses aggravating circumstances other than a recognized prior violent felony aggravator established in *Torres*, without first having the jury find said aggravators beyond a reasonable doubt,

the judge's findings of said aggravators are not harmless error.

9. To conclude that a judicial finding of aggravators other than the prior violent felony is harmless error would be to conclude that the prior violent felony aggravator, by itself, could be sufficient to outweigh any amount of mitigation, whether statutory or nonstatutory. Allowing a said judicial finding of other aggravators to effectively outweigh the mitigation would be to effectively evade said latter process endorsed by *Ring*, which would essentially let a sentencing judge impose the death sentence by using the prior violent felony aggravator as a smoke screen for other aggravating circumstances to slip by the constitutionally mandated requirement that the jury prove these aggravating circumstances beyond a reasonable doubt. This scenario has the possibility trumping even the greatest amount of mitigation, which is an unconstitutional violation under *Ring*, *Sattazahn*, *and Apprendi*, *Fla. Const. Art. 1 Section 22*, and *Furman v. Georgia.*

10. Again, said scenario is apparently not what the U.S. Supreme Court had in mind when it decided *Ring*, *Sattazahn*, or even *Torres*, when in *Ring* the Court stated that "if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a Defendant, that fact – no matter how the State labels it – constitutes an element of the offense, and must be found by a jury beyond a reasonable doubt. *Id*. In other words, if the sole prior violent aggravator is not enough to outweigh the mitigation present, any other aggravating circumstances become elements of the offense, and first must be proven beyond a reasonable

doubt before the sentencing judge can use them in the weighing process.

11. It follows that if other aggravating circumstances are necessary for a sentencing judge to successfully outweigh mitigation, said aggravating circumstances become elements of the offense, and therefore it is not harmless error to have a judicial finding on elements of the offense.

12. Moreover, in determining whether federal constitutional error may be considered harmless, the United States Supreme Court has held that, "before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18 (1967). Under this test, the "beneficiary of the constitutional error," the State, must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*

13. Applying the holding in *Chapman* to the facts of Defendant's case, the State cannot prove beyond a reasonable doubt that the sentencing judge, without using and incorporating Defendant's other aggravating circumstances in the weighing process against the mitigation, could have sentenced Defendant to death.

14. For instance, the trial judge, in his written findings, found the following aggravating circumstances: (1) Defendant had a prior violent felony conviction; (2) The capital felony was committed for pecuniary gain; (3) Capital felony was committed while Defendant was engaged in the commission of a burglary of a dwelling. The trial judge appropriately merged aggravating (2)

and (3) into one burglary/pecuniary gain aggravating circumstance. Further, the trial judge found four nonstatutory mitigators: (1) Artistic Ability; (2) Low intelligence; (3) Abused by his stepfather; (4) Enjoyed playing with children. After weighing both the established aggravating circumstances against the mitigation, the trial judge sentenced Defendant to death.

15. Applying the harmless error test in light of *Ring* and *Sattazahn*, it cannot be said the sentencing judge could have sentenced Defendant to death based solely on Defendant's prior violent felony aggravator. In *Nibert v. State*, this Court held that it has affirmed **death sentences** supported by **one aggravating circumstance** only in cases **involving** "either nothing or very **little** in **mitigation." 574 So. 2d 1059 (Fla. 1990). Further, this Court held that** substantial **mitigation** may make the **death** penalty inappropriate even when the **aggravating circumstance** of heinous, atrocious, or cruel has been proved. *Smalley v. State*, 546 So. 2d 720 (Fla. 1989).

16. The sentencing judge, without having the jury find the merged aggravating circumstance beyond a reasonable doubt as held by *Ring*, *Sattazahn*, *Apprendi*, and *Torres*, could only constitutionally weigh Defendant's prior violent felony aggravator against the four established findings of mitigation. Because Defendant had more than just, "little or no mitigation," it cannot be said beyond a reasonable doubt that the sentencing judge could still have found this sole aggravating circumstance to outweigh the four mitigators, and therefore the judge's finding of the merged aggravating circumstance, without the jury finding it first

beyond a reasonable doubt, is not harmless error under *Chapman*.

17. Lastly, in conjunction with *Ring*, *Sattazahn*, and *Apprendi*, *Furman v. Georgia* is also violated when a sentencing judge unconstitutionally imposes a sentence of death by using aggravating circumstances other than the prior violent felony, without first having the jury prove these other aggravating circumstances beyond a reasonable doubt.

18. For instance, there is a violation of the Eighth Amendment when the sentencer's discretion is not channeled and limited, because the sentencing discretion then becomes a wholly arbitrary and capricious action... *Maynard v. Cartwright*, 486 U.S. 356 (1998).

19. Further, to allow a sentencing judge to essentially find "elements of the offense" (aggravating circumstances according to *Ring*, 536 U.S. (2002) and impose a death sentence, without the jury first finding the said elements beyond a reasonable doubt, is to allow a sentencing judge to impose the death penalty in an arbitrary and capricious manner under the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972).

20. Essentially, the Florida death penalty statute allows the sentencing judge to take the place of a jury and find the existence of the elements of a Defendant's death sentence beyond a reasonable doubt.

21. In Florida, it has been held that a jury, and not a judge, must find the existence of all the elements of an offense beyond a reasonable doubt. *Legg v. State*, 742 So. 2d 846 (2nd DCA 1999). *See also: Ramierz. v. State*, 810 So. 2d 836

Fla. (2001) [*"The state must prove each element of the charged offense beyond a reasonable doubt."]*

22. Now, with said United States Supreme Court holdings, aggravating circumstances are elements of an offense, and a judge that imposes a death sentence without first a jury finding of any aggravators beyond a reasonable doubt(other than a prior violent felony) is not only unconstitutionally imposing the death penalty under *Ring* and *Sattazahn*, but further imposing a death penalty that is in violation of the Eighth Amendment and *Furman*, because the judge is arbitrarily and capriciously finding elements of an offense that is solely for the jury to find.

23. Lastly, the following summary of arguments is made for the purpose of this Court to consider as well as to preserve Defendant's federal appeals.

(1) *Sattazahn v. Pennsylvania's* holding which states, "a jury, and not a judge, must find the existence of any aggravating circumstances... beyond a reasonable doubt," applies to all states that use aggravating circumstances necessary to impose the death penalty, including Florida. 537 So. 2d 101 (2003).

(2) A sentencing judge that sits with a jury in Florida is no different than a sentencing judge that sits without a jury in Arizona, because an imposition of the death penalty can only be made if a judge makes written findings and concludes that aggravating circumstances outweigh mitigating circumstances. Without said finding by a judge, the maximum penalty in both states is life imprisonment. [*Stating that without said findings by the court a Defendant... shall be*

punished by life imprisonment.] Fla. Stat. 775.082(1) (2003)

(3) *Ring* has retroactive application to Defendant's Post-conviction appeals. *Summerlin v. Stewart*, 2003 U.S. App. LEXIS 18111.

(4) Florida's aggravating circumstances, with the exception of the prior violent felony aggravator, are elements of the offense and must be found by a jury beyond a reasonable doubt, and therefore, the said aggravating circumstances must be found unanimously. [*"In this state, the verdict of the jury must be unanimous," and a violation of said rule violates Defendant's Due Process rights to a fair trial.]* *Jones v. State*, 92 So. 2d 261 (Fla. 1956). [*Before jurors can return a guilty verdict, they must unanimously agree that each element of the charged offense has been established beyond a reasonable doubt.]* *Fla. R. Crim. Pro. 3.440.*

(5) Florida Standard Jury Instructions are flawed under *Ring* and *Caldwell* because they state to the jury that their recommendation and role of death is only advisory.

(6) The finding of all mitigating circumstances is a factual "finding of fact that increases the maximum punishment that may be imposed on a Defendant" under *Ring*, and therefore a jury is to make a finding of all the mitigating factors, as well as all the aggravating circumstances (excluding prior violent felony aggravator.) [*"If a state makes an increase in a Defendant's authorized punishment contingent on the finding of a fact, the fact -no matter how the State labels it - must be found by a jury beyond a reasonable doubt."*] *Johnson v. Nevada*, 59 p. 3d 450 (2002).

(7) The weighing process itself that determines whether there are sufficient aggravating circumstances that outweigh mitigating circumstances is also a "finding of fact that increases the maximum punishment that may be imposed on a Defendant" under *Ring*, and therefore shall be found by the jury.

(8) Jury sentencing is mandated by the Eighth Amendment.

(9) The jury has to make specific, written findings as to what aggravating circumstances and mitigating circumstances were found beyond a reasonable doubt in order to ensure that the death penalty is not being imposed arbitrary under *Furman v. Georgia*.

WHEREFORE, Defendant requests this Honorable Court to grant this Motion for rehearing based on said decisions by the United States Supreme Court and/or grant Defendant's Motion for rehearing and thereby order the trial court to conduct an evidentiary hearing on Defendant's ineffective assistance of counsel claims and the trial court's failure to consider mitigation claim.

APPENDIX 2

IN THE SUPREME COURT OF FLORIDA

JOHN D. FREEMAN,

Appellant,

CASE NO. SC01-2007

v.

STATE OF FLORIDA,

Appellee.
_____/

RESPONSE TO MOTION FOR REHEARING

Counsel reargues that trial counsel was ineffective for failing to present Freeman's drug and alcohol abuse in the penalty phase as non-statutory mitigation. Motion for rehearing at 3. Trial counsel did not want to present evidence of drug and alcohol abuse because it is often viewed negatively by jurors. At the evidentiary hearing, trial counsel testified that he was unaware of the defendant's alcohol and drug use. (EH 362). He was aware of Freeman's use of marijuana, cocaine, and alcohol. (EH 98). Trial counsel testified that he did not want to present evidence

of alcohol and illegal drug use to the jury. (EH 336,364). Portraying the defendant as a doper or drunk would not advance the cause. (EH 337). Trial counsel explained that there is a good segment of society that is not crazy about drug use. (EH 337). In his view, alcohol and illegal drug use are not compelling mitigation. (EH 337,362). The trial court found that trial counsel's decision not to present evidence of alcohol and illegal drug use was a tactical decision, based on counsel's belief that jurors do not view such information favorably. (R. 1160).

Alcohol and illegal drug use are dangerous mitigation. *Tompkins v. Moore*, 193 F.3d 1327, 1338 (11th Cir.1999)(noting that alcohol and drug abuse is a two-edged sword which can harm a capital defendant as easily as it can help him at sentencing); *Clisby v. Alabama*, 26 F.3d 1054, 1056 (11th Cir.1994)(noting that many lawyers justifiably fear introducing evidence of alcohol and drug use); *Rogers v. Zant*, 13 F.3d 384,388 (11th Cir.1994)(noting reasonableness of lawyer's fear that defendant's voluntary drug and alcohol use could be "perceived by the jury as aggravating instead of mitigating"); *Wade v. Calderon*, 29 F.3d 1312,1318-19 (9th Cir.1994)(holding counsel was not ineffective for failing to present evidence of petitioner's PCP use because of his belief that jury would use such evidence only in aggravation). Jurors do not view alcohol or drug use as mitigating. Some jurors view illegal drug use as aggravating rather than mitigating. Counsel is not ineffective for recognizing the reality and making a strategic decision based upon it.

Both Freeman's low intelligence and abuse by stepfather were presented by trial counsel and found by the trial court as non-statutory mitigators. Both of these are significantly more compelling mitigation than drug and alcohol abuse. Both I.Q. and childhood abuse involve situations beyond the defendant's control, unlike illegal drug use, which makes such mitigation more compelling to a jury. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1564 (1998)(conducting a survey of actual jurors who sat on death penalty cases and concluding that mental retardation was powerful mitigation based on a survey reporting that 44.3% of jurors stated that it would make them much less likely to vote for death if the defendant was retarded). There is no prejudice.

Counsel seeks a second evidentiary hearing to present drug and alcohol abuse evidence. This is really an ineffective assistance of collateral counsel claim. There is no constitutional right to effective assistance of collateral counsel. *King v. State*, 808 So.2d 1237, 1245 (Fla. 2002)(rejecting a claim that postconviction counsel was ineffective because a defendant has no constitutional right to effective collateral counsel, *citing Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989), *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), and *Lambrix v. State*, 698 So.2d 247 (Fla.1996).

Counsel also asserts that Freeman's death sentence is disproportionate. Motion for rehearing at 11. The proportionality of the sentence is a direct appeal issue. *Rose v. State*, 617 So.2d 291 (Fla. 1993)(finding claim of proportionality to be procedurally barred in postconviction proceedings, even though additional mitigating evidence was presented at the evidentiary hearing, because claim had been rejected on direct appeal). It is not properly raised in a post-conviction appeal and certainly not for the first time in a motion for rehearing. This claim is procedurally barred.

Counsel next asserts that the trial court did not consider all mitigating evidence. Motion for rehearing at 14. Counsel argues that the defendant's age should have been found as mitigating as well as several other characteristics. This is a direct appeal issue. *Atwater v. State*, 788 So.2d 223, n.5 (Fla. 2001)(finding a claim that the trial court violated the Eighth Amendment by failing to find and weigh the mitigating circumstances in the record to be procedurally barred because it should have been raised in the direct appeal). It is not properly raised in a post-conviction appeal and certainly not for the first time in a motion for rehearing. This claim is procedurally barred.

Freeman contends his death sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Motion for rehearing at 19. First, it is not proper to raise an entirely new issue in a motion for rehearing.

Furthermore, *Ring* is not retroactive. The Eleventh Circuit and four state supreme courts have held *Ring* is not retroactive. Moreover, numerous courts, including federal circuit courts, state supreme courts and two Florida district courts have held that *Apprendi*, which was the precursor to *Ring*, is not retroactive. *Ring* involves only half of an *Apprendi* error. So, if *Apprendi* does not warrant retroactive application, *Ring* cannot.

RETROACTIVITY

Neither *Ring*, nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000), upon which it was based, are retroactive. Both *Apprendi* and *Ring* are rules of procedure, not substantive law. They both concern who decides a fact, *i.e.*, the jury or the judge, which is procedural. *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002), *cert. denied*, 123 S.Ct 541 (2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" - who decides a given question (judge versus jury) and under what standard (preponderance versus reasonable doubt) and explaining that *Apprendi* did not alter which facts have what legal significance). New procedural rules are not applied retroactively.[1]

According to the federal test of retroactivity, *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), only "watershed" rules of criminal procedure which (1) greatly affect the accuracy and (2) alter understanding of the bedrock procedural elements essential to the

fairness of a proceeding are applied retroactively. *Sawyer v. Smith*, 497 U.S. 227, 242, 111 L.Ed.2d 193, 110 S. Ct. 2822 (1990).[2]

Ring does not enhance the accuracy of the conviction or involve a bedrock procedural element essential to the fundamental fairness of a proceeding. Only those rules that seriously enhance accuracy are applied retroactively. *Graham v. Collins*, 506 U.S. 461, 478, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993)(explaining that the exception is limited to a small core of rules which seriously enhance accuracy). Jury involvement in capital sentencing does not enhance accuracy. Indeed, the *Ring* Court did not require jury involvement because juries were more rational or fair; rather, it was required regardless of fairness. The *Ring* Court explained that even if judicial factfinding were more efficient or fairer, the Sixth Amendment requires juries. *Ring*, 536 U.S. at 607 (observing that the Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders). Jury sentencing does not increase accuracy. A jury is comprised of people who have never made a sentencing decision before. Furthermore, even if one views jury sentencing as equally accurate to judicial sentencing, jury involvement does not "seriously" enhance accuracy. Judicial sentencing is at least as accurate.

FEDERAL DECISIONS

The Eleventh Circuit has held that *Ring* is not retroactive. In *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003), the Eleventh Circuit, using a *Teague* framework, determined that *Ring* was a new procedural rule, not a new substantive rule because "*Ring* altered only who decides ..." The *Turner* Court reasoned that *Ring* did not alter the facts necessary to establish the aggravating circumstances or the standard of proof. The Court reasoned that because *Apprendi* was a procedural rule, it axiomatically follows that *Ring* is also a procedural rule. They concluded that the retroactivity analysis of *Apprendi* applies equally to *Ring*. The Eleventh Circuit also concluded that *Ring* does not warrant retroactive application under *Teague* because it does not enhance accuracy of fairness. The Court noted that pre-*Ring* sentencing procedure did not diminish the likelihood of a fair sentencing hearing. Rather, *Ring's* new rule, at most, would shift the fact-finding duties during Turner's penalty phase from an impartial judge to an impartial jury. The Eleventh Court explained that *Ring* was based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding context. The Eleventh Circuit relied on two state supreme court decisions holding that *Ring* was not retroactive and their prior decision holding that *Apprendi* was not retroactive. *Colwell v. State*, 59 P.3d 462 (Nev. 2002); *State v. Towery*, 64 P.2d 828 (Ariz. 2003); *McCoy v. United States*, 266 F. 3d 1245,

1258 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002). The *Turner* Court also relied on United State Supreme Court's precedent finding that *Apprendi* was not plain error. *United States v. Cotton*, 535 U.S. 625, 632-33, 122 S.Ct. 1781, 1786, 152 L.Ed.2d 860 (2002)(holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings and thus did not rise to the level of plain error).[3]

The Ninth Circuit, however, in *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), *petition for cert. filed*, (U.S. September, 23, 2003)(No. 03-526), held that *Ring* was retroactive. The Ninth Circuit reasoned that *Ring* is substantive and changes in substantive law are automatically retroactive under *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)(noting that *Teague* applies only to procedural rules, not when courts decide the meaning of a criminal statute and explaining that decisions involving a substantive federal criminal statute which hold that the statute does not reach certain conduct "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal" citing *Davis v. United States*, 417 U.S. 333, 94 S. Ct. 2298, 41 L.Ed. 2d 109 (1974).[4]

Alternatively, the Ninth Court held that even if *Ring* is procedural, it is still retroactive under *Teague*. The Ninth Circuit reasoned that the second exception to *Teague* applied because jury factfinding seriously enhances the accuracy

of capital sentencing proceedings and the right to a jury trial is a bedrock procedural element. First, the Ninth Circuit found that juries seriously enhance the accuracy of capital sentencing proceedings compared to judges.[5] The Ninth Circuit also found because the issue involved the Sixth Amendment right to a jury trial, the matter involved a bedrock procedural element essential to fairness.[6] The Ninth Circuit also held that *Ring* errors are not subject to harmless error analysis.[7]

STATE DECISIONS

Four state supreme courts have held that *Ring* is not retroactive. In *Head v. Hill*, 2003 Ga. LEXIS 850 (October 6, 2003), the Georgia Supreme Court, using federal retroactivity principles, held that *Ring* was not retroactive. They rejected a claim that *Ring* required any finding of mental retardation be made by the jury rather than a judge.

In *State v. Lotter*, 664 N.W.2d 892 (Neb. 2003), the Nebraska Supreme Court, using the *Teague* test, held that *Ring* was not retroactive. In 1996, a three-judge panel sentenced Lotter to death. Lotter contended *Ring* is substantive, not procedural, and therefore, *Teague* did not apply. The *Lotter* Court concluded that *Ring* was procedural. The Nebraska Supreme Court explained that a substantive rule is one which determines the meaning of a criminal statute or addresses the criminal significance of certain facts; whereas, a procedural rule is one which determines fact-finding procedures. They

explained that there are two exceptions to the general rule of nonretroactivity announced in *Teague*. *Ring* did not fall within the first *Teague* exception because *Ring* "clearly does not place any type of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe." Nor did *Ring* fall within the second *Teague* exception because *Ring* could not be viewed as enhancing the accuracy of the sentence. The *Lotter* Court discussed the Arizona Supreme Court's decision in *State v. Towery*, 64 P.3d 828 (Ariz. 2003), and the Nevada Supreme Court's decision in *Colwell v. State*, 59 P.3d 463 (Nev. 2002), both of which had held that *Ring* was not retroactive. The *Lotter* court found the numerous decisions from state and federal courts finding *Apprendi* not to be retroactive highly persuasive because *Ring* was based on *Apprendi*. The *Lotter* court also found guidance in the United States Supreme Court's recent decision in *United States v. Cotton*, 535 U.S. 625 (2002), which held that an *Apprendi* error is not plain error. The Nebraska Supreme Court concluded that *Ring* announced a new constitutional rule of criminal procedure which does not fall within either of the *Teague* exceptions and thus, does not apply retroactively.[8]

In *Colwell v. State*, 59 P.3d 463 (Nev. 2002), the Nevada Supreme Court held that *Ring* was not retroactive. In his state post-conviction petition, Colwell contended that his sentencing by a three-judge panel violated his Sixth Amendment right to a jury trial established in *Ring*. The *Colwell* Court explained that in *Ring*, the United States Supreme

Court held that it was impermissible for a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. However, the Court declined to apply *Ring* retroactively on collateral review. *Colwell*, 59 P.3d at 469-472. The Nevada Supreme Court used an expanded *Teague* test to determine retroactivity. The *Colwell* Court reasoned that *Ring* does effect the accuracy of the sentence. The *Colwell* Court explained that the United States Supreme Court, in *Ring*, did not determine that factfinding by the jury was superior to factfinding by a judge; rather, the United States Supreme Court stated that "the superiority of judicial factfinding in capital cases is far from evident." The *Colwell* Court explained that *Ring* was based simply on the Sixth Amendment right to a jury trial, not on enhanced accuracy in capital sentencings, and does not throw into doubt the accuracy of death sentences decided by three-judge panels. They concluded that the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances. *Colwell*, 59 P.3d at 473.

In *State v. Towery*, 64 P.2d 828 (Ariz. 2003), the Arizona Supreme Court also held that *Ring* is not retroactive. Following a *Teague* analysis, the Arizona Supreme Court first determined that *Ring* was a new rule but that the new rule was procedural, not substantive. The *Towery* Court reasoned that *Ring* did not determine the meaning of a statute, nor address

the criminal significance of certain facts, nor the underlying prohibited conduct; rather, *Ring* set forth a fact-finding procedure designed to ensure a fair trial. *Ring* altered who decided whether aggravating circumstances existed. The *Towery* Court noted that the *Apprendi* Court itself described the issue as procedural. *Apprendi*, 530 U.S. at 475, 120 S.Ct. 2348 (stating that: "[t]he substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is."). Because *Ring* was merely an extension of *Apprendi*, logic dictates that if *Apprendi* announced a new procedural rule, then so did *Ring*. Therefore, *Ring* was procedural. Nor did *Ring* announce a watershed rule because it did not seriously enhance accuracy nor alter bedrock principles necessary to fairness. It did not seriously enhance accuracy because *Ring* merely shifted the duty from an impartial judge to an impartial jury. Nor is allowing an impartial jury to determine aggravating circumstances, rather than an impartial judge, implicit in the concept of ordered liberty. The *Towery* Court found *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct.2093, 20 L.Ed.2d 1308 (1968), which held that the right to a jury trial was not to be applied retroactively, "particularly persuasive."[9]

One state supreme court had held that *Ring* is retroactive. In *State v. Whitfield*, 107 S.W.3d 253 (Mo.2003), the Missouri Supreme Court reopened a direct appeal by recalling the mandate. The *Whitfield* Court held that all four steps in the penalty phase included any factual findings related to mitigation and any balancing

of aggravation versus mitigation, not just the finding of one aggravator, must be made by the jury. The *Whitfield* Court declined to adopt the federal test of retroactivity announced in *Teague v. Lane*, 489 U.S. 288, 308, 109. S.Ct. 1060, 103 L.Ed.2d 334 (1989). The *Whitfield* Court held that *Ring* was retroactive under the old *Linkletter/Stovall* test.[10] The *Whitfield* Court determined that the remedy was imposition of a life sentence, not a remand for a new jury to determine the penalty.

The United States Supreme Court has disapproved the practice of using motions to recall the mandate to reopen cases the final minus "extraordinary circumstances" involving "grave, unforeseen contingencies" *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)(finding a "grave" abuse of discretion in a federal appellate court granting a motion to recall the mandate in a habeas case because of the "profound interests in repose attaching to the mandate" and the State's interest in finality which is "all but paramount"). A change in law is not an "extraordinary circumstance" involving "grave, unforeseen contingencies." Indeed, the *Calderon* Court suggested that only a strong showing of actual innocence would outweigh the State's interests in finality and thus, justify the recalling of a mandate. No appellate court, state or federal, should recall a mandate six years after it was issued merely because of a subsequent development in the law.

However, having done so, the Missouri Supreme Court does not recognize the consequence of its actions. Because the Missouri Supreme Court recalled the mandate of the direct appeal, the result was to render the case still pending on direct appeal. The recalling of the mandate made the case unfinal. *Whitfield* is now a direct appeal case. Retroactivity in collateral review is not an issue in a case pending on direct review. Any new rule applies to a case on direct review regardless of whether the rule existed at the time of the trial. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)(holding that a new rule for the conduct of criminal prosecutions is to be applied to all cases, state or federal, pending on direct review or not yet final). The *Whitfield* Court's entire discussion of *Teague* and the retroactivity of *Ring* is rendered dicta by the recalling of the direct appeal mandate.

The Missouri Supreme Court had previously held that *Apprendi*, upon which *Ring* was based, was not retroactive. *Whitfield*, 107 S.W.3d at 267 at n.13. So, according to the Missouri Supreme Court, *Apprendi* is not retroactive, but *Ring* is. The Missouri Supreme Court provides no explanation for these incongruous holdings. *Apprendi* involved both the right to a jury trial and the due process standard of proof. *Ring* involves only the right to a jury trial because most, if not all states, including Missouri, determined the existence of aggravators at the higher, beyond a reasonable doubt, standard of proof prior to *Ring*. So, *Ring* is

only half of *Apprendi*.[5] If *Apprendi* is not retroactive, then half of *Apprendi* cannot be.[11]

Furthermore, the Missouri Supreme Court seems to be determined to be deciding retroactivity on a case-by-case basis but retroactivity should be determined based on the stage of litigation. *Teague*, 489 U.S. at 303-305 (deploring the "unequal treatment of those who were similarly situated" under the retroactivity rules applied by the Court prior to *Teague* and noting that the "selective application of new rules violate the principle of treating similarly situated defendants the same."). Additionally, the holding that all steps must be made by the jury is tantamount to a holding that a jury, not the judge, must be the ultimate sentencer in a capital case which is a conclusion specifically rejected by Justice Scalia in his *Ring* concurrence. *Ring*, 122 S.Ct. at 2445 (Scalia, J., concurring)(stating that "today's judgment has nothing to do with the jury sentencing" and "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so..."). Furthermore, the *Whitfield* Court's remedy of an automatic life sentence is based on a misreading of *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed. 2d 588 (2003). *Whitfield*, 107 S.W.3d at n.20. The *Sattazahn* Court concluded that there was no double jeopardy bar to a new penalty phase after the first jury hung on the penalty and, pursuant to a state statute, the judge imposed a life sentence because there were no factual findings in favor of acquittal by either the jury or judge. The Court explained that it is not the mere

imposition of a life sentence that raises the double-jeopardy bar. Rather, an "acquittal" of the death penalty is required and that means that the jury found that no aggravating circumstances existed. As the *Sattazahn* Court characterized it, the jury deadlocking at 9 to 3 was a "non-result". And the judge's determination was not an acquittal either, because the judge had no discretion pursuant to the statute but to impose a life sentence. The judge made no findings and resolved no factual matters. As the *Sattazahn* Court characterized it, the judge's decision was a "default judgment" required by statute. In *Whitfield*, the penalty phase jury also hung but, unlike *Sattazahn*, the judge imposed death, not life. The *Whitfield* Court improperly reasoned that as a matter of law that the judge was required to enter a life sentence when the death sentence is unconstitutional. However, this was the exact reasoning the *Sattazahn* Court rejected when it rejected any "statutory entitlement to life" argument. An acquittal, for double jeopardy purposes, is determined as a matter of fact by a fact finder, not as a matter of law. Contrary to the reasoning of the *Whitfield* Court, there is nothing "hollow" about a defendant having his penalty determined by a jury in a new penalty phase. The correct remedy for a violation of the Sixth Amendment right to a jury trial is to provide the defendant with a jury. A determination by appellate court is fiat not the correct remedy.

While only a few courts have addressed the retroactivity of *Ring*, numerous courts have addressed the related issue of whether *Apprendi*

is retroactive. Two Florida District Courts have held that *Apprendi* is not retroactive. *Figarola v. State*, 841 So.2d 576 (Fla. 4th DCA 2003)(concluding that *Apprendi* would not be retroactive under either *Witt* or *Teague* but certifying the question as one of great public importance); *Hughes v. State*, 826 So.2d 1070 (Fla. 1st DCA 2002)(holding that *Apprendi* did not apply retroactively to a claim being raised under rule 3.800 based on a *Witt* analysis), *rev. granted*, 837 So.2d 410 (Fla. 2003).[12] All eleven federal circuits that have addressed the issue have held that *Apprendi* is not retroactive.[13]

Recently, the Second Circuit joined "this chorus". *United States v. Coleman*, 329 F.3d 77 (2d Cir. 2003). The *Coleman* Court reasoned that, while *Apprendi* was a "new" rule of law, it was a procedural rule, not a substantive rule. New substantive rules change the definition of a crime and therefore create a risk that the defendant was convicted of an act that is no longer criminal. To mitigate such a risk, new rules of substantive law are applied retroactively. The Second Circuit noted that *Apprendi* itself said that the substantive basis of New Jersey's enhancement was not at issue; rather, it was the adequacy of its procedures. *Coleman*, citing *Apprendi*, 530 U.S. at 475 and *McCoy*, 266 F.3d at 1257 n.16. The *Coleman* Court rejected the argument that *Apprendi* was substantive because it turned a sentencing factor into an element. The fact of drug quantity was a fact in dispute that had to be proven before *Apprendi*. *Apprendi* merely changed who decided the fact and at what standard of

proof. Drug quantity was always an element in the sense that it was something that the government had to prove to someone at some standard. The fact was not "new" in this sense and therefore, was not truly a new element.

The First Circuit has also recently held that *Apprendi* is not retroactive. *Sepulveda v. United States*, 333 F.3d 55 (1st Cir. 2003). The *Sepulveda* Court held that *Apprendi* is not retroactive because it does not seriously enhance the accuracy of convictions. While an *Apprendi* error may raise questions as to the length of his sentence, inaccuracies of this nature, occurring after a defendant has been duly convicted by a jury beyond a reasonable doubt are matters of degree and do not trump the general rule of nonretroactivity. The First Circuit explained that the length of the sentence was "not plucked out of thin air, but, rather, was determined by a federal judge based upon discrete findings of fact established by a fair preponderance of the evidence." The First Circuit agreed with the Seventh Circuit's observation that findings by federal judges, though now rendered insufficient in certain instances by *Apprendi*, are adequate to make reliable decisions about punishment because "[a]fter all, even in the post-*Apprendi* era, findings of fact made by the sentencing judge, under a preponderance standard, remain an important part of the sentencing regimen." The First Circuit noted that watershed rules of criminal conduct procedure are "hen's-teeth" rare. They noted the Supreme Court is reluctant to establish rules that enjoy the venerated status of

watershed. A decision by a judge (on the preponderance standard) rather than a jury (on the reasonable-doubt standard) is not the sort of error that undermines the fairness of judicial proceedings. The First Circuit Court also noted that applying *Apprendi* retroactively would create an unacceptably high risk that those found guilty of criminal conduct might escape suitable punishment. They observed that although the *Apprendi* rule is important as a means of clarifying the proper factfinding roles of judge and jury, it affords an innocent defendant no additional shield from wrongful conviction. They rejected any reliance upon Justice O'Connor's characterization, in her dissent, of *Apprendi* as "a watershed change in constitutional law" because her concern was a practical one regarding the "flood of petitions by convicted felons seeking to invalidate their sentences" that the decision would cause. Several state supreme courts have held that *Apprendi* is not retroactive either.[14]

While the *Ring* Court did not address the retroactivity of their new decision, Justice O'Connor, in her dissent, stated that *Ring* was not retroactive. *Ring v. Arizona*, 122 S.Ct. 2428, 2449-2450(2002)(O'Connor, J., Dissenting)(noting that capital defendant's will be barred from taking advantage of the holding on federal collateral review, citing 28 U.S.C. §§ 2244 (b)(2)(A), 2254 (d)(1) and *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The United States Supreme Court has refused to apply right to jury trial cases retroactively in prior cases. *DeStefano v. Woods*, 392 U.S. 631, 633, 88 S.Ct. 2093,

2095, 20 L.Ed.2d 1308 and "should receive only prospective application."). The United States Supreme Court recently held that an *Apprendi* claim is not plain error. *United States v. Cotton*, 122 S.Ct. 1781 (2002)(holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to the level of plain error). If an error is not plain error, the United States Supreme Court will not find the error of sufficient magnitude to allow retroactive application of such claim in collateral litigation. *United States v. Sanders*, 247 F.3d 139, 150-151 (4th Cir. 2001)(emphasizing that finding something to be structural error would seem to be a necessary predicate for a new rule to apply retroactively under *Teague* and because *Apprendi* claims have been found to be subject to harmless error, a necessary corollary is that *Apprendi* is not retroactive). Thus, the United States Supreme Court will not apply *Ring* retroactively either.

This Court has never addressed the issue of the retroactivity of *Ring*. This Court should address the question, adopt *Teague* and hold that *Ring* is not retroactive.

CONCLUSION

The State respectfully requests that this Honorable Court deny the motion for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEARBY CERTIFY that a true and correct copy of the foregoing RESPONSE TC MOTION FOR REHEARING has been furnished by U.S. Mail to Frank Tassone, Esq., 1833 Atlantic Boulevard Jacksonville, FL 32207 this 10th day of November, 2003.

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[1] Florida uses the old constitutional test for retroactivity rather than the new *Teague* test. *Teague v. Lane*, 489 U.S. 288, 299-310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Witt v. State*, 387 So.2d 922 (Fla. 1980). Florida courts should also adopt the *Teague* test for retroactivity. The *Witt* test of retroactivity was based on two United States Supreme Court cases dealing with retroactivity, *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), and *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The United States Supreme Court no longer uses these tests for determining retroactivity on collateral review because, as the *Teague* Court observed, the old *Linkletter/Stovall* test led to inconsistent results and disparate treatment of similarly situated defendants. *Teague*, 489 U.S. at 302-303. Both the Arizona and New Hampshire Supreme Court have adopted *Teague* for the pragmatic reason that the law regarding retroactivity is complex enough without requiring counsel and trial judges to apply different retroactivity tests. *State v. Tallard*, 816 A.2d 977, 980 (N.H. 2003); *State v. Slemmer*, 823 P.2d 41, 49 (Ariz. 1991). Moreover, *Witt* raises serious due process concerns. One of the prongs of *Witt* is that the new rule is constitutional in nature, implying that changes in the interpretation of a statute are automatically not retroactive, but it is changes in the meaning of the statute that raise actual innocence problems. *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828, (1998)(noting that *Teague* applies to procedural rules, not when courts decide the meaning of criminal statute and explaining that decisions involving substantive federal criminal statute which hold that the statute does not reach certain conduct "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal" citing *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). Any state with a retroactivity test which lacks a substantive / procedural distinction runs the risk of violating due process, just as the Pennsylvania Supreme Court did in *Fiore v. White*, 528 U.S. 23, 120 S.Ct. 469, 145 L.Ed.2d 353 (1999)(applying, in a habeas petition from a state conviction, a due process insufficiency of the

evidence analysis when the element of the crime changed); *see also Bunkley v. Florida*, 2003 WL 21210417 (May 27, 2003)(remanding for reconsideration of a retroactivity issue where this Court employed the *Witt* test). Despite the canard about states being free to adopt any test of retroactivity, states without the equivalent of a substantive retroactivity test will encounter due process problems. Florida should adopt *Teague* to avoid these concerns.

[2] Under *Teague*, there are two exceptions to the general rule of non-retroactivity. The first exception, relating to substantive rules, requires retroactive application if the new rule places private conduct beyond the power of the State to proscribe or addresses a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendant's because of their status or offense. *Saffle v. Parks*, 494 U.S. 484, 494, 108 L.Ed.2d 415, 110 S.Ct. 1257 (1990). The second exception is for watershed rules of criminal procedure which implicate the fundamental fairness and accuracy of the criminal proceeding. *Ring* and *Apprendi*, because they are both new procedural rules, not substantive, involve only second exception, not the first.

[3] The Fifth Circuit has noted that it doubts *Ring* is retroactive. *In re Johnson*, 334 F.3d 403, 405 n.1 (5th Cir. 2003)(declining to reach the issue but questioning whether *Ring* can be retroactive because *Apprendi* is not retroactive in the circuit and noting that "logical consistency" suggests that *Ring* is not retroactive since *Ring* is essentially an application of *Apprendi*).

[4] While the Ninth Circuit quotes *Bousley*, the quotes are taken out of context. Changes in substantive law are applied retroactively because they raise the possibility of legal innocence. When the definition of an element of a crime is changed, it raises the possibility that a defendant has been convicted of conduct that is not criminal under the correct definition. *Ring* does not involve any possibility of legal innocence or legally innocent of the death penalty. Therefore, *Ring* is not substantive and *Bousley* does not apply.

[5] The majority gave five reasons for its belief that juries seriously enhance the accuracy of capital sentencing proceedings compared to judges: (1) presentation of inadmissible evidence to judges; (2) truncated and informal presentation of evidence and argument; (3) judge's decision did not reflect the "the conscience of the community"; (4) judges' view of the capital sentencing as being "routine"; and (5) the political pressure on judges facing election. The first and second observations are non sequiturs. They concern alleged flaws in penalty phase proceedings, not the accuracy of judge versus jury sentencing. Garbage in, garbage out is true regardless of who hears the garbage. Furthermore, juries are also exposed to victim impact statements and inadmissible hearsay during penalty phase. § 921.141 (7), Fla. Stat. (2002)(providing that the prosecution may introduce, and subsequently argue, victim impact evidence, once it has provided evidence of one aggravating circumstance); *Windom v. State*, 656 So.2d 432, 438 (Fla.1995)(reject an argument that victim impact evidence amounts to nonstatutory aggravation); §921.141(1), Fla. Stat. (2002)(providing any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements); *Rodriguez v. State*, 753 So.2d 29, 47 (Fla. 2000)(noting that under § 921.141, the appropriate test for determining whether hearsay evidence is admissible is whether the evidence is relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."). Unlike juries, judges are trained to think about the accuracy of hearsay. The third and fifth observations are contradictory. Either judges live in ivory towers far from the crowd or they respond to the community's desires due to democratic forces; they cannot be both. Either judges are out of touch with the community OR they are in touch with the community due to the political pressures of elections. The fourth observation is

just plain silly. The Ninth Circuit uses descriptions such as "acclimation" to the capital sentencing process, "routine" "habituation" brought about by imposing capital punishment under "near rote conditions" and "just another criminal sentence" to describe judges' view of capital sentencing. Translated, this means that judges are experienced in capital sentencing and juries are not. Experience increases accuracy. Judges have extensive prior experience with factfinding and are legally trained. The *Ring* Court, itself, explained that while judge fact-finding may be more efficient, the Sixth Amendment requires juries. Regardless of the superiority of judicial factfinding, the Sixth Amendment requires juries. The *Ring* Court also noted that the superiority of judicial factfinding in capital cases was far from evident. *Ring*, 536 U.S. at 607. However, the *Ring* Court did not take the position that jury factfinding was superior to judicial factfinding as the Ninth Circuit did. Judges are actually more accurate than juries due to their experience and legal training. Because judges are at least as accurate as juries in their fact-finding, *Ring* does not seriously enhance accuracy in capital sentencing and therefore, does not meet this prong of *Teague*.

[6] United States Supreme Court precedent does not support the view that cases involving the Sixth Amendment right to a jury trial are automatically bedrock. The United States Supreme Court has declined to apply cases retroactively that involve the right to a jury trial. *DeStefano v. Woods*, 392 U.S. 631, 633, 88 S. Ct. 2093, 2095, 20 L.Ed.2d 1308 (1968)(holding that the right to jury trial in state prosecutions was not retroactive and "should receive only prospective application.").

[7] United States Supreme Court precedent does not support the view that *Ring* errors are not subject to harmless error analysis. While the United States Supreme Court has not directly addressed whether *Ring* errors are subject to harmless error analysis, it has held that *Apprendi* errors are subject to harmless error analysis. *United States v. Cotton*, 122 S.Ct. 1781 (2002)(holding an *Apprendi* claim is not plain error where the indictment failed to include the quantity of drugs because the *Apprendi* error did not

seriously affect fairness, integrity, or public reputation of judicial proceedings). Moreover, the United States Supreme Court has held that the omission of an element of a crime can be harmless in *Neder v. United States*, 527 U.S. 1, 144 L.Ed.2d 35, 119 S.Ct. 1827 (1999). While the Ninth Circuit attempts to distinguish *Neder*, the United States Supreme Court itself cited *Neder* in *Ring* when it declined to address harmlessness. *Ring* at n.7. The only difference is that *Neder* was a non-capital case. *Summerlin* at n.20.

[8] The Nebraska Supreme Court had previously granted relief based on *Ring* in a direct appeal. *State v. Gales*, 658 N.W.2d 604 (Neb. 2003)(remanding for a new penalty phase). Nebraska was judge only sentencing, unlike Florida which is a hybrid state. *Ring*, 536 U.S. 584 at n.6; Neb. Rev. Stat. §29-2520 (1995).

[9] The Arizona Supreme Court analyzed the retroactivity of *Ring* using a *Teague* test but also analyzed the issue using the test of *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986). Under the *Allen* framework, the court weighed three factors: (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. The Arizona Supreme Court concluded that *Ring* was not retroactive under *Allen* either. The *Allen* is similar to Florida's *Witt* test. So, *Ring* is not retroactive under *Witt* either.

[10] *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

[11] In Florida, aggravating factors are found beyond a reasonable doubt. *Geralds v. State*, 601 So.2d 1157, 1163 (Fla. 1992)(stating it is axiomatic that the State is required to establish the existence of an aggravating circumstance beyond a reasonable doubt). Florida has always required the higher standard of proof in this area. *State v. Dixon*, 283 So.2d 1,9 (Fla. 1973). Aggravators were already decided at

the higher standard of proof before *Apprendi* or *Ring*. The standard of proof wing is probably the more critical part of *Apprendi* in terms of accuracy and that wing is not at issue in a capital case. The "who" wing of *Apprendi* is the only part at issue in a *Ring* claim. So, *Ring* actually is only half of *Apprendi*.

[12] Briefing is complete and the oral argument has been held in *Hughes*. *Hughes*, SC02-2247. This Court issued an order to stay the proceedings pending resolution of *Hughes* in *Figarola*, SC03-586.

[13] *Sepulveda v. United States*, 2003 WL 212366 (1st Cir. May 29, 2003)(discussed infra); *United States v. Coleman*, 329 F.3d 77 (2d Cir. 2003)(discussed infra); *United States v. Swinton*, 2003 U.S. App. LEXIS 12697 (3d Cir. June 23, 2003)(relying on the Supreme Court's own description of *Apprendi* as procedural and holding *Apprendi* is not retroactive); *United States v. Jenkins*, 2003 U.S. App. LEXIS 12265 (3d Cir. June 18, 2003)(holding *Apprendi* is procedural and not retroactive); *United States v. Sanders*, 247 F.3d 139 146-51 (4th Cir. 2001), *cert. denied*, 535 U.S. 1032, 122 S.Ct. 573, 151 L.Ed.2d 445 (2001)(explaining that because *Apprendi* is not retroactive in its effect, it may not be used as a basis to collaterally challenge a conviction); *United States v. Brown*, 305 F.3d 304 (5th Cir. 2002), *cert. denied*, - U.S. -, 123 S.Ct. 1919, 155 L.Ed.2d 840 (2003)(holding *Apprendi* is not retroactive because it is a new rule of criminal procedure, not a new substantive rule and is not a "watershed" rule that improved the accuracy of determining the guilt or innocence of a defendant); *Goode v. United States*, 305 F.3d 841 (6th Cir.2002) *cert. denied*, - U.S. -, 123 S.Ct. 711, 154 L.Ed.2d 647 (2002)(holding *Apprendi* is not a watershed rule citing *Neder v. United States*, 527 U.S. 1, 15, (1999); *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002), *cert. denied*, - U.S. -, 123 S.Ct 541, 154 L.Ed.2d 334 (2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" and is not fundamental because it is not even applied on direct appeal unless preserved); *United States v. Moss*, 252 F.3d. 993, 1000-1001 (8th Cir. 2001), *cert. denied*, 534 U.S. 1097, 122

S.Ct. 848, 151 L.Ed.2d 725 (2002)(holding that *Apprendi* is not of watershed magnitude and that *Teague* bars petitioners from raising *Apprendi* claims on collateral review); *United States v. Sanchez-Cervantes*, 282 F.3d 664. 667 (9th Cir.2002), *cert. denied*, 154 L.Ed.2d 243, 123 S.Ct. 48 (2002)(holding *Apprendi* does not meet either prong or *Teague* because it does not criminalize conduct and does not involve the accuracy of the conviction and therefore, *Apprendi* is not to be retroactively applied); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir.2002), *cert. denied*, - U.S. -, 123 S.Ct. 388, 154 L. Ed. 2d 315 (2002)(concluding *Apprendi* is not a watershed decision and hence is not retroactively applicable to initial habeas petitions); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002)(holding that the new constitutional rule of procedure announced in *Apprendi* does not apply retroactively on collateral review).

[14] *People v. De La Paz*, 791 N.E.2d 489 (Ill. 2003)(holding *Apprendi* is not retroactive because it is not a watershed rule of criminal procedure that increases the reliability of the conviction); *Whisler v. State*, 36 P.3d 290 (Kan. 2001)(holding that *Apprendi* is not retroactive because it is a procedural rather than substantive and is not a watershed rule of criminal procedure that implicates the fundamental fairness of trial), *cert. denied*, 122 S.Ct. 1936 (2002); *State ex rel. Nixon v. Sprick*, 59 S.W.3d 515, 520 (Mo. 2001)(holding in *Apprendi* is not applied retrospectively to cases on collateral review relying on *Dukes v. United States*, 255 F.3d 912, 913 (8th Cir. 2001).

APPENDIX 3

SUPREME COURT OF FLORIDA

CASE NO.: SC01-2007
Lower Tribunal No.: 86-11599-CFA

JOHN D. FREEMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

MOTION TO FILE REPLY TO OR IN THE ALTERNATIVE REQUEST AN ORAL ARGUMENT TO STATE OF FLORIDA'S RESPONSE TO DEFENDANT'S MOTION FOR REHEARING

Defendant, JOHN D. FREEMAN, by and through his undersigned counsel, files this Motion to File Reply To or in the alternative request an Oral Argument to State of Florida's Response to Defendant's Motion for Rehearing, and in support thereof states as follows:

1. Defendant was previously convicted of first-degree murder. (R. 145, 1564).

2. Defendant was subsequently sentenced to death after a jury vote of 9-3. (R. 257-259).

3. Defendant appealed his convictions and sentences, which were later affirmed on

direct appeal. *Freeman v. State*, 563 So. 2d 73 (Fla. 1990).

4. Defendant filed a 3.850 Motion for Post-conviction Relief in 1995, in the Fourth Judicial Circuit, and said Motion was denied.

5. Defendant appealed the denial of said Motion to the Florida Supreme Court, and this Court remanded the issue of ineffectiveness of counsel at the penalty phase and the issue of racial bias claim for an evidentiary hearing, and affirmed the rest of said denial. *Freeman v. State*, 761 So. 1055 (Fla. 2000).

6. The trial court denied the remanded issues of the 3.850 Motion after an evidentiary hearing on July 16th and 17th, 2001.

7. Defendant appealed the trial court's denial to the Florida Supreme Court, alleging the following issues: (1) Ineffective assistance of counsel at the guilt phase of trial for failing to object to the State's alleged improper reliance on racial factors in seeking the death penalty (2) Ineffective assistance at the penalty phase for failing to present evidence in mitigation.

8. On July 11, 2003, the Supreme Court of Florida affirmed the trial court's denial of Defendant's Motion for Post-conviction Relief under Fla. R. Crim. Pro. 3.850. *Freeman v. State*, 852 So. 2d 216 (Fla. 2003).

9. The undersigned counsel was appointed to represent Defendant in the remainder of Post-conviction proceedings on July 9th, 2003.

10. The undersigned counsel filed a Motion for Rehearing in this Court on October 31, 2003.

11. The State filed a timely response to said Motion for Rehearing, which was received by the undersigned on November 12, 2003.

12. The State's response alleges, among other issues that *Ring v. Arizona* does not apply retroactively to collateral review. (State's Response, p. 4)

13. The State also makes the assertion that this Court should change its test for determining retroactivity by receding from *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and adopting *Teague v. Lane*, 489 U.S. 288 (1989).

14. The undersigned asserts that either the *Witt v. State* test or the *Teague v. Lane* test, *Ring v. Arizona* applies retroactively in Florida.

15. The undersigned further asserts that the *Teague v. Lane* test should not be adopted by Florida, because *Witt v. State* passes constitutional muster.

16. Lastly, the State makes the assertion that Defendant's trial counsel was not ineffective for making a strategic decision not to use the mitigation of Defendant's use of drugs and alcohol. (State's Response, p. 2).

17. The State supports this claim by citing cases that hold that "alcohol and drug use are dangerous mitigation," and Defendant's established nonstatutory mitigators of low I.Q. and abuse by his stepfather "are significantly more compelling mitigation than drug and alcohol abuse." (Id.)

18. The State concludes by showing that Defendant counsel's failure to present evidence of drug and alcohol abuse did not prejudice the

Defendant, and supports this assertion by citing a Law Review article which essentially states that mental retardation was the most powerful mitigation based on a survey of jurors. (Id.)

19. However, the State fails to recognize and answer the crux of Defendant's argument, i.e., the correlation between Defendant's drug and alcohol abuse and possible mental mitigation in light of said abuse, and whether an expert should have been appointed to establish possible mental mitigation.

20. The State misunderstands Defendant's argument regarding Defendant's trial counsel's ineffectiveness.

21. In other words, Defendant does not argue that his trial counsel was ineffective for not putting on evidence of drug and alcohol abuse, but rather Defendant argues that his trial counsel was ineffective for not raising or having an expert determine if Defendant's long term drug and alcohol abuse lead to any statutory mental mitigation, to-wit: (1) extreme mental and emotional disturbance and, (2) capacity to control one's behavior.

22. The said mental mitigation, unlike the State's assertion (the State makes the assertion that "jurors do not view alcohol or drug use as mitigating")(State's Response, p. 2), are two of the weightiest mitigators available to a Defendant, and failure to present this mitigation may constitute prejudicial ineffectiveness. See *Gaskin v. State*, 822 So. 2d 1243 (Fla. 2002), [*holding the mitigators of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control behavior are of*

the weightiest order, and the failure to present them in the penalty phase may constitute prejudicial ineffectiveness].

23. Therefore, Defendant argues, in light of his long-term drug and alcohol abuse, Defendant's trial and appellate counsel were ineffective in failing to present an expert witness who was qualified to give an opinion as to the correlation between the Defendant's mental mitigation and his substance abuse. Said argument was also known to the trial court. ("this Court will also note that the Defendant did not present at the evidentiary hearing from an expert qualified to testify regarding the effects of Defendant's alcohol and drug abuse")(Trial Court's denial of Defendant's 3.850 Motion on evidentiary review).

24. Further, this said failure to have a qualified expert testify to any statutory mental mitigation the Defendant might have as the result of his said substance abuse prejudiced the Defendant, because this mitigation is of the weightiest order, and the failure to examine the said possible mental mitigation cannot be held to be strategic when there were no other statutory mitigators presented. This failure to examine the correlation between Defendant's substance abuse and mental mitigation is the reason why Defendant seeks an evidentiary hearing, and why Defendant's trial counsel was ineffective.

WHEREFORE, Defendant requests this Honorable Court to grant Defendant's Motion to file a reply to the said State's responses to Defendant's Motion for Rehearing, or in the alternative, Defendant requests an Oral Argument

on the issue(s) discussed in this Motion, to-wit: (1) *Ring v. Arizona* and whether it applies retroactively to Florida, (2) Whether *Witt v. State* should be receded and *Teague v. Lane* be adopted as the test for determining retroactivity in Florida collateral review cases, and (3) Whether Defendant's counsel was ineffective for failing to have a qualified expert determine whether Defendant had any statutory mental mitigation as the result of his long term drug and alcohol abuse.